Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

SHERBROOKE TURF, INC.,

Petitioner,

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, et al.,

and

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the holding of the Eighth Circuit that Congress had a "compelling governmental interest" for adopting the Transportation Equity Act for the 21st Century, which provides for racial preferences in federally funded highway construction contracts, conflicts with the requirements of "strict scrutiny" set out in ***Adarand v. Peña***, 515 U.S. 200 (1995) and ***City of Richmond v. J.A. Croson Co.***, 488 U.S. 469 (1989)?

2. Whether the holding of the Eighth Circuit that the racial preferences in federally funded highway construction contracts is "narrowly tailored" conflicts with the holdings of this Court in ***Adarand*** and ***Croson*** and with those of the majority of the Circuit Courts of Appeals?

3. Whether the holding by the Eighth Circuit that Minnesota need not demonstrate "compelling governmental interest" to justify imposition of racial preferences in Minnesota highway construction contracts conflicts with the holdings of this Court in ***Adarand*** and ***Croson*** and with those of the majority of the Circuit Courts of Appeals?

4. Whether the holding by the Eighth Circuit that use of racial preferences in Minnesota highway construction contracts is "narrowly tailored" conflicts with the holdings of this Court in ***Adarand*** and ***Croson*** and with those of the majority of the Circuit Courts of Appeals?

5. Whether the adoption by Congress and imposition upon all fifty states of nationwide racial preferences in federally funded highway construction contracts exceeds Section 5 of the Fourteenth Amendment and conflicts with the holdings of this Court in ***City of Boerne v. Flores***, 521 U.S. 507 (1997), and its progeny?

LIST OF PARTIES

Petitioner Sherbrooke Turf, Inc. ("Sherbrooke") was Plaintiff at the U.S. District Court for the District of Minnesota and Appellant before the U.S. Court of Appeals for the Eighth Circuit. Pursuant to Supreme Court Rule 29.6, Sherbrooke declares that no publicly held company holds more than 10 percent of Sherbrooke's stock.

Respondents Minnesota Department of Transportation and its commissioner (together as "MnDOT") and the United States Department of Transportation and its commissioner (together as "USDOT") were Defendants at the U. S. District Court and Appellees before the Eighth Circuit.

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OPINIONS BELOW

Review is sought of the opinion of the U.S. Court of Appeals for the Eighth Circuit, 345 F.3d 964 (8th Cir. 2003), which is reproduced in the Appendix. The opinion and order of the U. S. District Court for the District of Minnesota, 2001 U.S. Dist. Lexis 19565 (D.Minn., Nov. 14, 2001), is reproduced in the Appendix.

JURISDICTION

The Judgment of the Eighth Circuit was entered on October 6, 2003. Pursuant to Supreme Court Rule 13.3, this Petition is filed timely within 90 days of entry of judgment. Pursuant to 28 U.S.C. § 1254 (1), this Court has jurisdiction to review the judgment of the Eighth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the Fifth and the Fourteenth Amendments to the United States Constitution.

OTHER LAWS INVOLVED

This Petition involves Section 1101(b)(1) of the Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107, 113, as well as the implementing regulations, 49 C.F.R. § 26, 64 Fed. Reg. 5096 (Feb. 2, 1999), and MnDOT's state program.

STATEMENT OF THE CASE

I. Federal Laws

In 1998, Congress enacted "TEA-21", which provides: "Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program [under the Act] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals [otherwise referred to as

disadvantaged business enterprises or "DBEs"]."

TEA-21 continued the DBE highway program first established by STAA in 1982, followed by STURAA in 1987, and ISTEA in 1991. Like its predecessors, 49 C.F.R. §26.21 conditions receipt of federal financial assistance for state highway projects upon each state's establishment of a "DBE" program in accordance with the federal regulations, which presume that minorities and women are "socially and economically disadvantaged individuals."

TEA-21 differed from its predecessors in a number of respects. First, TEA-21 shifted the focus from achieving the *"maximum feasible extent"* of DBE participation in federal highway construction to achieving *the "absence of discrimination."* ***Id.*** at §26.45(b). Second, *states* were given authority to "examine their markets and determine the amount of participation they would expect DBEs to achieve in the absence of discrimination and the effects of past discrimination." ***Id.*** Third, if states do not identify discrimination limiting DBE participation in their market, then states are prohibited from using discriminatory measures. ***See*** 64 Fed. Reg. 5103 (1998). Fourth, if states determine that discrimination limited DBE participation, they must attain discrimination-free level "by using race-neutral means of facilitating DBE participation." ***See*** 49 C.F. R. §26.51(a). Fifth, if states attain discrimination-free marketplaces by race-neutral means alone, they may not use discriminatory measures. ***See*** 64 Fed. Reg. 5104, 5134. Sixth, if states cannot attain discrimination-free markets by race-neutral means, they must use discriminatory measures. ***Id.*** at 5133. Seventh, discriminatory measures are limited to requiring that prime contractors attempt to use a specific percentage of DBE subcontractors on designated projects, even if the DBE subcontractor did not submit the low bid. State selection of

prime contractors does not permit use of any discriminatory measures: states continue to select prime contractors on the basis of low bid. ***Id.*** at 5099 ("Nothing in this regulation requires, under any circumstances, a recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has presented a lower bid. This rule does not interfere with recipients' implementation of state and local low bid legislation.").

Congress had no evidence of racial discrimination within the highway construction industry when it enacted TEA-21. ***See*** 144 Cong. Rec. H500, S1400, S1407, S1428 (1998) (hereinafter "TEA-21 Hearings"). Instead of setting forth a factual record, Congress ordered the General Accounting Office ("GAO") to conduct such a fact-finding effort (hereinafter "GAO Report"). ***See*** TEA-21 §1101(b) (6)(G)-(I). The GAO found no evidence of nation-wide racial discrimination within the highway construction industry. ***See*** GAO Report at A-71.

II. MnDOT's Effort to Satisfy Federal DBE Requirements

In 1999, MnDOT's DBE participation rate was 2.25%. ***Sherbrooke Turf, Inc. v. MnDOT, et al,*** 345 F.3d 964, 972 (8th Cir. 2003). In 2001, MnDOT nonetheless established an overall DBE participation goal of 11.6% because DBEs represent approximately 11.6% of MnDOT's market. ***Id.*** MnDOT then established a race-conscious goal of 9% because that was the approximate difference between MnDOT's overall goal and current participation. ***Id.*** MnDOT acted to achieve this race-conscious goal by requiring prime contractors to use higher DBE subcontractor bids, provided the price difference is not "unreasonable." ***See*** Deposition of Michael Garza at A-62.

When MnDOT established its discriminatory program, it knew of no discrimination in its marketplace. ***Id.*** at A-64, 66.

See also MnDOT Response to Admission Request Nos. 3, 7 and 8, at A-67, 69. MnDOT was "not aware of any discrimination that's occurred in Minnesota which Minnesota's DBE program has been set up to remedy." ***See*** Garza Deposition at A-65. MnDOT also recognized that it could maintain a discrimination-free marketplace by purely race-neutral means. ***Id.*** at A-63, 64.

III. Application to Appellant

Sherbrooke is a non-minority owned business that provides landscaping services to prime contractors on federally-assisted highway projects. Sherbrooke has bid on such projects in the past, will continue to do so and suffers competitive harm when contracts are awarded to others under MnDOT's DBE program. ***Sherbrooke,*** 345 F.3d at 967.

IV. Lower Court Treatment

Sherbrooke commenced this action against MnDOT challenging the constitutionality of both the federal and MnDOT's DBE program; the Federal Government intervened. ***Id.*** The Federal Defendants moved for summary judgment. The State Appellees joined in that motion. In addition to opposing the Defendants' motions, Sherbrooke filed its own cross-motion for summary judgment. Sherbrooke argued that both the MnDOT program and the federal laws were unconstitutional as a matter of law because they were not narrowly tailored to a compelling governmental interest. ***Id.***

The District Court entered summary judgment in favor of the State and Federal Defendants. The Court held that, based upon the Tenth Circuit's decision in ***Adarand Constructors, Inc. v. Slater,*** 228 F.3d 1147 (10th Cir. 2000), ***cert. granted then dismissed as improvidently granted,*** 532 U.S. 103 (2001), the Minnesota and federal programs, both facially and as applied,

were constitutional. ***Sherbrooke,*** 345 F.3d at 968. A federal district court in Nebraska entered summary judgment on the same basis in connection with the same legal challenge, albeit with the state portion focused on Nebraska's implementation. ***Id.*** Copies of both district court decisions are reproduced in the Appendix.

Sherbrooke appealed, arguing that the district court erred in concluding that the federal laws satisfied strict scrutiny, and in concluding that Minnesota need not separately establish that its implementation of the federal laws satisfied strict scrutiny review. ***Id.*** The same appeal was undertaken in the Nebraska case. ***Id.*** The cases were consolidated for appeal. ***Id.*** The Eighth Circuit Court of Appeals affirmed both lower court decisions in total reliance on the Tenth Circuit's holding in ***Adarand.*** ***Id.*** A copy of the Eighth Circuit decision is reproduced in the Appendix.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S HOLDING THAT THE FEDERAL GOVERNMENT HAD A COMPELLING INTEREST TO ENACT TEA-21 AND 49 C.F.R. §26 CONFLICTS WITH HOLDINGS OF THIS COURT AND OTHER CIRCUIT COURTS.

The Eighth Circuit Court of Appeals held that there was a "strong basis in evidence" of discrimination to justify the federal government-sponsored discrimination within TEA-21 and 49 C.F.R. § 26. ***Id.*** at 970. The Court did not conduct its own analysis to reach this conclusion; it relied entirely on the Tenth Circuit's analysis of evidence in ***Adarand.*** ***Id.*** The Eighth Circuit then held that Sherbrooke failed to rebut this evidence because, although Sherbrooke "presented evidence that the [federal] data was susceptible to multiple interpretations, .

. . [it] failed to present affirmative evidence" that there was no discrimination in the highway construction industry. ***Id.***

The Eighth Circuit's holding conflicts with those of this Court in ***City of Richmond v. J.A. Croson,*** 488 U.S. 469 (1989) and ***Adarand v. Peña,*** 515 U.S. 200 (1995).

A. The Federal Government's Factual Predicate Fails to Meet the Requirements of *Croson* and *Adarand.*

The "benchmark for judging the adequacy of the government's factual predicate for affirmative action [i]s whether there exists a 'strong basis in evidence' for [the government's] conclusion that remedial action was necessary." ***Croson,*** 488 U.S. at 500. This "strong basis in evidence" requires *intentional discrimination.* ***See Croson, Id.*** at 509 ("findings of constitutional or statutory violations"); ***City of Boerne v. Flores,*** 521 U.S. 507, 532-33 (1997) ("unconstitutional behavior"; "intentional discrimination"); ***Kimel v. Florida Bd. of Regents,*** 528 U.S. 62 (2000) ("unconstitutional discrimination violations"); ***Bd. of Trustees of the Univ. of Ala. v. Garrett,*** 531 U.S. 356, 370 (2001) ("unconstitutional discrimination"). In addition, it is not enough that *some* intentional unconstitutional discrimination have been identified: the discrimination must be *"widespread". **See Adarand,*** 515 U.S. at 237, ***citing United States v. Paradise,*** 480 U.S. 149 (1987) ("pervasive, systematic and obstinate discriminatory conduct"); ***Boerne,*** 521 U.S. at 531 ("widespread pattern of religious discrimination in this country"); ***Kimel,*** 528 U.S. at 91 ("national"; "widespread pattern").

Congress did not *find* discrimination *when it enacted TEA-21,* nor did it even *look* for it. ***See*** TEA-21 Hearings at S1400 (no federal government "findings" or study done on discrimination); ***Id.*** at S1428 ("None of the fundamental

evidentiary requirements necessary to support the preference in this legislation have been established by the administration or Congress."); ***Id.*** at H500 (no evidence "that actual discrimination has occurred within the transportation industry").

Congress did, however, direct the GAO to "look" for or make to "findings" of discrimination *as a condition to passage of TEA-21*. ***See*** TEA-21 §1101(b)(6)(G)-(I). The GAO concluded that even if the Federal Government *had* looked for evidence of systematic discrimination, it could not, and therefore would not, have *found* that evidence when TEA-21 was enacted. ***See*** GAO Report at A-71.

B. The Federal Government is Entitled to No Deference.

"[A] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." ***Personnel Administrator of Mass. v. Feeney***, 442 U.S. 256, 272 (1979). This requires courts to confront all racial classifications with "skepticism" and a "most searching analysis." ***Adarand,*** 515 U.S. at 233, ***quoting Wygant v. Bd. of Educ.***, 476 U.S. 267, 273 (1986). ***See also Rothe Dev. Corp. v. U.S. Dept. of Defense,*** 262 F. 2d 1306,1321(Fed. Cir. 2001) ("[A]s set forth in ***Adarand,*** Congress is entitled to no deference in determining whether Congress had a compelling interest in enacting the racial classification.")

C. The Eighth Circuit Failed to Skeptically or Fully Examine the Federal Evidence for the Required Extraordinary Justification: the Court Impermissibly Allowed that the Possibility of Societal Discrimination Qualified as a Compelling Interest.

The Eighth Circuit acknowledged that the federal evidence proved only the "possibility" of discrimination. ***See Sherbrooke,*** 345 F.3d at 970 (the federal evidence was "susceptible to multiple interpretations"). Treating this as a compelling interest impermissibly created both a *new evidentiary basis* for justifying a federal discriminatory contracting program and a *new deferential standard for judicial review.*

The documents relied upon by the Tenth Circuit in ***Adarand*** and the Eighth Circuit here chronicled various "problems" experienced by minority contractors. Some of these problems occurred in the highway industry. Impermissibly, many, if not most, came from outside this industry or were "undefined." "[T]he district court must also determine whether discriminatory conduct or effects were experienced in the specific industry." ***Rothe***, 262 F.3d at 1330. ***See Croson,*** 488 U.S. at 492 (limited to "the local construction industry"); ***Assoc. Gen. Contractors of Calif. v. Coalition for Economic Equity,*** 950 F.3d 1401, 1413 (9th Cir. 1991) ("within the municipality's legislative jurisdiction"); ***Cone Corp. v. Hillsborough,*** 908 F.2d 908, 915 (11th Cir.), ***cert. den.***, 498 U.S. 983 (1990); ***Saunders v. White,*** 2002 WL 338744 (D.D.C. 2002) at 28 ("even if the Army discriminated against black officers in general, it does not necessarily mean that black officers in the JAG Corps were discriminated against").

By not determining whether and to what extent discrimination occurred within the highway construction industry, the court impermissibly treated the possibility of "societal discrimination" as a compelling interest. This ruling conflicts with those of this Court and other circuits. "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." ***Croson,*** 488 U.S. at 497, ***citing Wygant v. Bd. of Educ.,*** 476 U.S. 267, 276 (1986).

Accord Rothe, 262 F.3d at 1323***; Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County, Florida,*** 943 F.Supp. 1546 (S.D. Fla. 1996), ***aff'd,*** 122 F.3d 895, 907 (11th Cir. 1997), ***cert. den.,*** 523 U.S. 1004 (1998); ***Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia***, 893 F.Supp. 419 (E.D. Pa. 1995), ***aff'd,*** 91 F.3d 586, 596 (3rd Cir. 1996); ***Middleton v. City of Flint, Michigan,*** 92 F.3d 396, 402 (6th Cir. 1996); ***O'Donnell Constr. Co. v. District of Columbia,*** 963 F.2d 420, 428 (D.C.Cir. 1992).

The Tenth Circuit also relied upon "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey" (the "Preliminary Survey"). 228 F.3d at 1169; it cited to this compendium eighteen times. ***Id.*** at 1167-75. The court's reliance on this document is completely misplaced. The "Preliminary Survey" was prepared by the Department of Justice. ***See In re: Sherbrooke Sodding,*** 17 F. Supp. 2d at 1026, 1034 (D. Minn.1998). The Federal District Court for the District of Minnesota examined this compendium; what it found was that it contained "five 'possible allegations' of discrimination: two in Illinois, two in Massachusetts, and one in New York." ***Id.*** Nothing about the "Preliminary Survey" was *compelling.* The Tenth Circuit improperly treated a *limited number* of private "allegations" and "problems" as a substitute for governmental "findings of widespread intentional discrimination". ***See Croson,*** 488 U.S. at 509 (compelling interest cannot be shown absent evidence of "judicial, legislative or administrative findings of constitutional or statutory violations"). ***See also*** GAO Report at A-107 (Noting that discrimination allegations need to be investigated "to determine whether the discrimination complaints filed by DBEs have merit.").

Moreover, this document was prepared after Congress

adopted TEA-21. "***Shaw*** makes clear that the quantum of evidence that is ultimately necessary to uphold racial classifications must *have actually been before the legislature* at the time of the enactment." ***Rothe,*** 262 F.3d at 1328. ***See Shaw v. Hunt***, 517 U.S. 899, 910 (1996), ***quoting Wygant v. Jackson Bd. of Educ.***, 476 U.S. 267, 277 (1986) ("[T]he institution that makes racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative action program.'"). ***See also Croson,*** 488 U.S. at 493; ***Builders Association of Greater Chicago v. County of Cook,*** 123 F.Supp.2d 1087 (N.D. Ill. 2000), ***aff'd.***, 256 F.3d 642, 645 (7th Cir.2001) ("A public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.").

II. THE EIGHTH CIRCUIT'S HOLDING THAT TEA-21 AND 49 C.F.R. §26 WERE NARROWLY TAILORED TO SERVE A COMPELLING INTEREST CONFLICTS WITH THIS COURT'S HOLDINGS IN *CROSON* AND *ADARAND.*

In determining whether a race-conscious remedy is "narrowly tailored," a court must consider: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the program; (3) flexibility; (4) numerical proportionality; (5) the burden on the third parties; and (6) over-or under inclusiveness. ***See Adarand,*** 515 U.S. at 237-38; ***Croson,*** 488 U.S. at 508. The Eighth Circuit failed to do so.

A. Race Neutral Alternatives

The Eighth Circuit's holding that the regulation *emphasized* "use of race-neutral means," 345 F.3d at 972, ignored the constitutional question of whether Congress first

meaningfully attempted to remedy any identified problem of racial discrimination by race-neutral means. ***See Croson,*** 488 U.S. at 507. If Congress could have remedied the "discrimination" by race-neutral means alone, then it was prohibited from requiring states to presume that all racial minorities are "socially disadvantaged" and to award DBE subcontractors a percentage of all contracts. ***See*** 49 C.F.R. §26.67(a); 64 Fed. Reg. 5133.

Had the Eighth Circuit done as ***Croson*** and ***Adarand*** mandate, it would have necessarily determined that Congress acted unlawfully in establishing a race-based highway construction contracting program. Congress admitted, *when it implemented TEA-21*, that it did not examine what discrimination, if any, by whom, and against whom, existed within highway construction, and, if any existed, whether it could be remedied by purely race-neutral means. ***See*** TEA-21 Hearings at S1400 ("made no findings, [and] made no factual analysis of the interstate highway program in order to determine [whether] there is some sort of systematic discrimination ongoing that ought to be corrected"); ***Id.*** at S1407 ("the federal government still have not produced . . . [a]ny evaluation of the effectiveness of existing federal race-neutral programs or the possibility of creating new ones."); ***Id.*** at H500 ("no evidence [was] presented that race-neutral remedies were attempted and found deficient."). The federal government never disputed this.

The only evidence of race-neutral usage within highway construction was that in connection with the predecessor to TEA-21; the federal government offered "that in 1978-20 years ago, and four years before Congress passed the first of these highway funding acts - a small business interest subsidy program was only minimally effective." ***In re Sherbrooke Sodding,*** 17 F.Supp.2d 1026, 1035 (Minn. 1998). Even if the

court were to have looked *outside the highway construction industry,* Congressional examination of race-neutral options was no less limited and outdated. The Supreme Court held "that Congress had carefully examined and rejected race-neutral alternatives [in 1977] before enacting the MBE set-aside." ***Croson,*** 488 U.S. at 891.

Congress was obligated to examine race-neutral remedies in 1998 before it enacted the challenged laws. ***See Fullilove v. Klutznick,*** 488 U.S. 448, 513 (1980)(Powell, J., concurring). No Supreme Court decision has ever held that a governmental body need not examine the "efficacy of alternative remedies" if it did so at some time in the past.

> If a District Order that is imposed after no evident consideration of the available alternatives can survive strict scrutiny as narrowly tailored, the requirement that a racial classification be 'narrowly tailored' for a compelling purpose has lost most of its meaning.

Paradise, 480 U.S. at 201 (O'Connor, J., dissenting).

The logic behind this duty is simple enough. Congress had the benefit of 20 plus years of additional hearings (and the related knowledge) in 1998 versus 1977. Congress was duty-bound to make use of the knowledge: analyze the national DOT industry; identify any barriers to minority subcontractor participation; and evaluate whether such barrier(s) could be remedied by race-neutral means alone. Congress should have done this when it enacted STAA in 1982, STURAA in 1987, ISTEA in 1991 or TEA-21 in 1998, but did not.

B. Limits on the Program Duration.

Congress must ensure that its race-based program is "appropriately limited" to last no longer than "the

discriminatory effects [it is] designed to eliminate." ***Adarand,*** 515 U.S. at 238. The Eighth Circuit held that Congress did so with regard to TEA-21 by way of "[p]eriodic legislative debate." 345 F.3d at 972. Congress did not, however, make any legislative findings on what "discriminatory effects" TEA-21 was "designed to eliminate." Moreover, the author of 49 C.F.R. §26 testified that he did not know "what discrimination the regulation was promulgated to remedy if any." ***See*** Deposition of Robert Ashby at A-59, 60. Congress never identified what "discriminatory effects" the laws were enacted to remedy: "[c]ontinued enforcement would be a gratuitous discrimination against non-minority persons." ***Builders Assoc.,*** 256 F.3d at 646.

Without any findings from Congress, any court reviewing TEA-21 is necessarily left to speculate as to what motivated Congress in 1998 to act. "[A] racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature's 'actual purpose' for the discriminatory classification." ***Shaw v. Hunt,*** 517 U.S. 899, 908 n.4 (1966). No reviewing court could know whether "the scope of the remedies" exceeded the "extent of the violations." ***Personnel Admin.,*** 442 U.S. at 300.

C. Numerical Proportionality

The federal program's goal-setting mechanism must be tied reasonably to the availability of minority businesses within the highway construction industry, which requires determining the number of DBEs that are "qualified, willing and able" to work. ***Croson,*** 488 U.S. at 509. ***Accord Associated General Contractors of Ohio, Inc. v. Drabik,*** 214 F.3d 730, 736 (6th Cir. 2000), ***cert. denied,*** 121 S.Ct. 1089 (2001); ***Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia,*** 899 F.Supp. 419, 432 (E.D.Pa. 1995), ***aff'd***, 91 F.3d 586 (3rd Cir. 1996). The Eighth

Circuit improperly held that 49 C.F.R. §26 tied "goals for DBE participation to the relevant labor markets." 345 F.3d at 972. The Eighth Circuit is in err for two reasons.

First, the federal program *allows* states to establish goals (and determine if discrimination exists sufficient to justify use of a race-conscious remedy) on the basis of "DBEs that have bid or quoted on your DOT-assisted *prime contracts* or subcontracts in the previous year." ***See*** 49 C.F.R. §26.43(c)(2) (emphasis added). This allows states to consider a work force that is irrelevant, that is, prime contractors, which continue to be selected on the basis of low bid. ***See*** 64 Fed. Reg. 5099 ("Nothing in this regulation requires, under any circumstances, a recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has presented a lower bid. This rule does not interfere with recipients' implementation of state and local low bid legislation."). Second, the information necessary to evaluate the relevant market (i.e. "ready, willing and able" subcontractors) has not been collected, thereby preventing establishment of goals based on "numeral proportionality." ***See*** GAO Report at A-86, 87, 88, 89, 90, 91, 92.

D. Burden

The Eighth Circuit did not analyze this factor. Had it done so, it would have necessarily determined that the burden is not "precisely tailored to serve a compelling interest." ***See Adarand***, 515 U.S. at 224-25. The challenged Federal laws do not identify what "effects of earlier discrimination" they were designed to "remedy." Without such information, the laws are necessarily unconstitutional. ***Id.*** at 236 ("[B]ecause classifications based on race are potentially so harmful, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.")

As noted in Section I, ***infra,*** the Eighth Circuit did not identify any widespread intentional discrimination within highway construction that prime contractors were perpetrating against minority subcontractors. Instead, the court allowed that allegations of "societal discrimination" were sufficient to justify a compelling interest. This ruling directly contradicts past rulings of this Court and other circuits. ***See Croson,*** 488 U.S. at 497, ***citing Wygant,*** 476 U.S. at 276; ***Dade County,*** 122 F.3d at 907; ***City of Philadelphia,*** 91 F.3d at 596; ***Middleton,*** 92 F.3d at 402; ***O'Donnell Constr. Co.,*** 963 F.2d at 428.

E. Random Inclusion

There is no question that, as written, 49 C.F.R. §26.61(c) requires states to presume that literally everyone in America is "socially and economically disadvantaged" except white males. The legal question is whether the inclusion of literally everyone but white males is "overly inclusive." Such blanket affirmative action coverage has been consistently struck down.

> There is absolutely no evidence of past discrimination against Spanish speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry.
>
> * * *
>
> The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

Croson, 488 U.S. at 506. ***See also Wygant,*** 476 U.S. 267, 284

n.13 (1986) (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); ***Fullilove v. Klutznick,*** 448 U.S. 448 (1980); ***Builders Association of Greater Chicago v. County of Cook,*** 256 F.3d 642 (7th Cir. 2001); ***Engineering Contractors,*** 122 F.3d 895 (11th Cir. 1997); ***Monterey Mechanical Co. v. Pete Wilson,*** 125 F.3d 702, 714 (9th Cir. 1997); ***Hopwood v. State of Texas,*** 78 F.3d 932, 951 (5th Cir. 1996) ("A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny."); ***Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia,*** 6 F.3d 990 (3rd Cir. 1993); ***Kornhass Contr., Inc. v. Oklahoma Dept. of Central Servs.***, 140 F.Supp.2d 1232 (W.D. Okla 2001).

The Eighth Circuit did not undertake the required "most searching analysis" of this factor. ***See Adarand,*** 515 U.S. at 233; instead, it may have adopted the Tenth Circuit's reasoning on this issue, which was that the federal laws were not "overly inclusive" because a *financial cap* limited who could participate. ***Adarand,*** 228 F.3d at 1186-87. This cap, at least theoretically, limits participation to those "economically" disadvantaged, but it does nothing to limit participation to those who are "socially" disadvantaged (**i.e**. those ethnic groups found by the Federal Government to have historically suffered discrimination). Congress recognized this. ***See*** TEA-21 Hearings at S1487 ("Changing the economic guidelines does not change the fact that the DOT will still presume that all members of certain races are 'socially disadvantaged' . . . without any particular findings of discrimination against particular individuals or even particular groups in the highway contracting area.").

What Congress should have provided was evidence of the systematic discrimination experienced by each of the benefitted groups. ***See Croson,*** 488 U.S. at 510-11 ("Absent

such findings, of constitutional or statutory violations there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics."); *Rothe*, 262 F.3d at 1330 ("Accordingly, Congress must have identified a pattern of discrimination that broadly affected all the minorities who receive a preference under the 1207 program."). Congress did not have such evidence when it enacted TEA-21.

> There is not one word in the remainder of the Act of legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identified the common characteristics that every member of the preferred class was believed to share.

TEA-21 Hearings at S1418 (***quoting Fullilove,*** 448 U.S. at 535 (Stevens, J. dissenting)).

> [T]he federal government still has not produced . . .[a]ny statistical analysis of whether the particular racial and ethnic groups granted presumptive eligibility are in fact disadvantaged because of patterns of deliberate exclusion or discrimination in recent years.
>
> * * *
>
> But there's no evidence that there's anywhere near enough discrimination to justify preferences for these favored groups.

Id. at S1407.

III. THE EIGHTH CIRCUIT'S HOLDING THAT A STATE NEED NOT PROVE THE EXISTENCE OF A COMPELLING INTEREST TO JUSTIFY ITS DECISION TO DISCRIMINATE UNDER A FEDERAL PROGRAM CONFLICTS WITH THIS COURT'S HOLDINGS IN *CROSON* AND *ADARAND*.

The Eighth Circuit held that, although MnDOT was required to proved that its decision to discriminate was "narrowly tailored," it was not required to prove the existence of a "compelling interest" because MnDOT was acting within a constitutional federal program. 345 F.3d at 970. The Eighth Circuit's holding conflicts with ***Croson*** and ***Adarand.***

A. Any Governmental Body That Discriminates On the Basis of Race Must Justify its Decision Under Strict Scrutiny.

Because "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny," ***Adarand,*** 515 U.S. at 224, and because strict scrutiny must be applied to "all racial classifications imposed by whatever federal, state, or local governmental actor," ***Id.*** at 227, the MnDOT program requires proof of both a compelling interest and a narrowly tailored response. ***Id.*** at 235.

The Eighth Circuit failed to determine whether Minnesota had any evidence of racial discrimination in the highway construction subcontracting industry sufficient to provide MnDOT a "compelling governmental interest"to discriminate. Had the Eighth Circuit done so, it would have learned from MnDOT that nobody has discriminated against

anyone: there has been no discrimination by sureties, unions, banks, MnDOT or prime contractors against DBE prime contractors, subcontractors or suppliers. ***See*** Deposition of Michael Garza at A-64, 66. ***See also*** MnDOT Response to Admission Requests Nos. 3,7 and 8 at A-67, 69. MnDOT admitted, in fact, that it was "not aware of any discrimination that's occurred in Minnesota which Minnesota's DBE program has been set up to remedy." ***See*** Garza Deposition at A-65.

The State lacked any "real evidence of past discrimination." The State's basis to implement a discriminatory policy was, at best, "conjecture" and "plausible hypotheses," neither of which is acceptable. ***See McNamara v. City of Chicago,*** 138 F.3d 219, 1222 (7th Cir. 1998); ***Majeske v. City of Chicago,*** 218 F.3d 816, 820 (7th Cir. 2000); ***Contractors Assoc. of E. Pa. v. City of Philadelphia,*** 6 F.3d 990, 1008 (3rd Cir. 1993). "Unlike ***Associated General Contractors v. Coalition for Economic Equity,*** 950 F.2d 1401, 1414 (9th Cir. 1991), there were no 'detailed findings of prior discrimination' and no extensive evidence of discrimination submitted." ***Monterey Mechanical Co. v. Wilson,*** 125 F.3d 702, 713 (9th Cir. 1997).

B. The Federal Regulations Expressly Required MnDOT to Produce Evidence of a Compelling Interest.

MnDOT must determine whether and to what extent discrimination exists to ensure that its goal reflects *MnDOT's determination* of the "level of DBE participation" MnDOT would expect "absent the *effects of discrimination*." 49 C.F.R. §26.45(b) (emphasis added). Moreover, MnDOT "must take an actual measurement of [its] marketplace." 64 Fed. Reg. 5109.

Section 26.45 makes clear that in setting overall

> goals, recipients aspire to achieving only the amount of DBE participation that would be obtained in a nondiscriminatory market. Recipients are not to simply pick a number representing a policy objective or responding to any particular constituency.

64 Fed. Reg. 5097. ***See also Id.*** at 5103, 5107, 5108, 5111 and 5113.

Nonetheless, the Eighth Circuit refused to determine whether MnDOT complied with the federal regulations, which was contrary to past circuit and district court decisions. ***See, e.g., Milwaukee County Pavers Association v. Fiedler,*** 922 F.2d 419, 424 (7th Cir. 1991)("Of course if the state exceeded its federal authority, it would be vulnerable to challenge under ***Croson*** ... ."); ***Harrison & Burrowes Bridge Constructors v. Cuomo,*** 981 F.2d 50, 57 (2nd Cir. 1992)(NYDOT subject to constitutional attack for program as-applied if deviated from federal regulations); ***Converse Const. Co., Inc. v. Mass. Bay Transp. Auth.,*** 899 F.Supp 753, 761 (D. Mass. 1995)("the state's actions could be challenged, however, if state agencies depart from the federal standards").

IV. THE EIGHTH CIRCUIT'S HOLDING THAT MnDOT'S DISCRIMINATORY DBE PROGRAM WAS NARROWLY TAILORED CONFLICTS WITH THIS COURT'S HOLDINGS IN *CROSON* AND *ADARAND.*

Although the Eighth Circuit held that MnDOT had a duty to demonstrate that its discriminatory DBE program was narrowly tailored to serve a compelling interest, the Eighth Circuit held that MnDOT's program was narrowly tailored *without examining any of the narrow tailoring factors.* 345 F.3d

at 971, 973. Without having examined the factors, the Court had no basis to rule as it did.

A. Race Neutral Alternatives

MnDOT was allowed to use a discriminatory program only if there was discrimination that could not be remedied by race-neutral means. ***See, e.g., Croson,*** 488 U.S. at 507; ***Adarand,*** 515 U.S. at 218; ***Wygant,*** 476 U.S. at 280 n.6. ***Accord*** 49 C.F.R. §26.51(a). MnDOT said it knew of no discrimination. ***See*** Garza Deposition at A-64, 65, 66. ***See also*** MnDOT Response to Admission Request Nos. 3, 7 and 8 at A-67, 69. There was consequently nothing to "remedy" by race-neutral or discriminatory means. Yet even if there were some discrimination of which MnDOT was unaware, MnDOT agreed that this could be prevented by purely race-neutral means. ***See*** Garza Deposition at A-63, 64. There was consequently no legal basis for MnDOT to use a discriminatory program.

B. Limits on Program Duration

MnDOT's DBE program must be "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" ***Adarand,*** 515 U.S. at 238. MnDOT admitted that it was not "aware of any discrimination that's occurred in Minnesota which Minnesota's DBE program has been set up to remedy." ***See*** Garza Deposition at A-65. MnDOT's program is, by definition, not "appropriately limited" in duration.

C. Flexibility

MnDOT's discriminatory program is not "flexible": it requires prime contractors to use higher priced DBE subcontractors provided their bid is not "unreasonably" higher. ***Id.*** at 34, line 25; 35; lines 1-5. While the Eighth Circuit characterized this as requiring only a "good faith effort," that

does not change its status as a racial quota.

> Whatever the terminology or palliative applied, whether the programs be called an "aspirational goal" or ameliorated by a "flexible waiver," the bottom line is that there is still a quota that is imposed by the government. This quota penalizes some and advantages others, each without constitutional justification.

Sherbrooke, 17 F.Supp.2d at 1037.

The lack of flexibility in this quota is magnified by the absence of any guidance to prime contractors on *when* a DBE subcontract bid becomes "unreasonably" high. ***See*** Garza Deposition at A-62. As a consequence, prime contractors have no idea when their obligation to use a higher DBE bid ends.

D. Numerical Proportionality

MnDOT's program must be limited to those "qualified, willing and able" to work. ***Croson,*** 488 U.S. at 509. ***Accord Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado,*** 2003 U.S. Lexis 8547 at 6 (U.S. 2003) (Scalia, J. dissenting); ***Associated General Contractors of Ohio v. Drabik,*** 214 F.3d 730, 736 (6th Cir. 2000). MnDOT's discriminatory program is limited to the preferred selection of *subcontractors*. ***See*** Garza Deposition at A-62. This does not alter MnDOT's selection of prime contractors on the basis of low bid. ***See*** 64 Fed. Reg. 5099 ("Nothing in this regulation requires, under any circumstances, a recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has presented a lower bid. This rule does not interfere with recipients' implementation of state and local low bid legislation."). Since the race-conscious focus is on subcontractors, the only "relevant labor market" is

subcontractors. The required "numerical proportionality" is missing because MnDOT improperly based its program on prime contractors, whose work cannot be the justification for MnDOT's preferred selection of subcontractors. ***Sherbrooke***, 345 F.3d at 973. MnDOT did not limit its DBE program to those "qualified, willing and able" to work. ***See Croson,*** 488 U.S. at 509.

E. Burden

MnDOT is not aware of any discrimination, nor is its discriminatory program set up "to counter the effects of discrimination." ***See*** Garza Deposition at A-65. By definition, MnDOT's program imposed an unconstitutional burden on subcontractors like Sherbrooke.

F. Random Inclusion

MnDOT was required to make findings of constitutional or statutory violations for all racial groups benefitted by its program. ***See Croson,*** 488 U.S. At 510-11. ***See also Contractors Assoc. of E. Pa. v. City of Philadelphia,*** 6 F.3d 990, 1007 (3rd Cir. 1993)("Consistent with strict scrutiny, we must examine the data for each minority group."); ***Builders Assoc.,*** 256 F.3d at 646; ***Rothe,*** 262 F.3d at 1329. Yet MnDOT utilizes an all-expansive discriminatory subcontractor selection program without any evidence that those who benefit by the racial preference have suffered any discrimination within Minnesota highway contracting.

V. THE EIGHTH CIRCUIT'S FAILURE TO ADDRESS WHETHER CONGRESS HAS POWER UNDER THE ENFORCEMENT CLAUSE OF THE FOURTEENTH AMENDMENT TO ENACT 1101(b) OF TEA-21 CONFLICTS WITH THIS COURT'S HOLDINGS.

The Eighth Circuit failed to address whether Congress had the power, under the Enforcement Clause of the Fourteenth Amendment, to enact the DBE program and thereby to interfere with the sovereign power of the States, power reserved by the Tenth Amendment, to award highway construction contracts. Had the Eighth Circuit done so, it would have been compelled to hold that Congress' power to enact such legislation pursuant to Section 5 of the Fourteenth Amendment is limited by the Amendment itself and by a series of cases recently decided by this Court: ***City of Boerne v. Flores***, 521 U.S. 507 (1997); ***Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank***, 527 U.S. 627 (1999); ***Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); U.S. v. Morrison***, 529 U.S. 598 (2000); ***and Board of Trustees of the University of Alabama v. Garrett***, 531 U.S. 356 (2001) (hereinafter ***Boerne*** and its progeny).

First, the Fourteenth Amendment prevents only purposeful, invidious discrimination by State actors. ***City of Mobile Alabama v. Bolden***, 446 U.S. 55, 65 (1980). "Congress' power under §5 …extends only to 'enforcing' the provisions of the Fourteenth Amendment," ***Boerne*** at U.S. 519, a power that is solely "remedial." ***Id.*** "Official action will not be held unconstitutional soley because it results in a racially disproportionatte impact." ***Village of Arlington Heights v. Metropolitan Housing Development Corporation***, 429 U.S. 252, 264-265 (1977); ***Bolden*** at U.S. 70.

Second, the Fourteenth Amendment prohibits only State action and does not reach private discrimination. "Congress' §5 authority is appropriately exercised only in response to *state* transgressions" of the Constitution. ***Garrett*** at 368. Indeed, ***Morrison*** at 621-624, struck down the Violence Against Women's Act in part because it targeted private actors.

"Congress' §5 authority is appropriately exercised only in response to *state* transgressions" of the Constitution." ***Garrett*** at 368. Because the DBE program targets facially neutral conduct, that is, the States' award of highway construction contracts to prime contractors, that program may not by justified under Section 5 of the Fourteenth Amendment. Moreover, because the States' award of highway construction contracts involves an essential sovereign power of the States, that power is reserved to the States by the Tenth Amendment.

Third, although Congress has the power, under ***Boerne*** and its progeny, not only to punish and rectify intentional, unconstitutional State violations of the Constitution, but also to deter, by means of preventive rules, "a somewhat broader swath of conduct," ***Kimel*** at 81; ***Boerne*** at 530, that broader swath extends only to State conduct that has "a significant likelihood of being unconstitutional." ***Boerne*** at 532; ***Florida Prepaid*** at 647. The stringent test for determining whether prophylactic congressional legislation has a "significant likelihood of being unconstitutional" requires proof of congruence and proportionality between the goal of enforcing constitutional conduct and the means chosen to do so. ***Boerne*** at 520.

Congruence and proportionality limit Congress' power to prevent unconstitutional conduct by States "to those cases in which constitutional violations [are] most likely," ***Boerne*** at 533, because only "jurisdictions with a demonstrable history of intentional race discrimination...create the risk of purposeful discrimination." ***Boerne*** at 532. Thus, Congress must have evidence of "widespread and persisting deprivation of constitutional rights, of the sort Congress has faced in enacting proper prophylactic §5 [of the Voting Rights Act] legislation," by those jurisdictions to which it applies that remedy. ***Florida Prepaid*** at 64, **citing *Boerne*** at 526; ***Morrison*** at 626-627; and

Garrett at 368. As applied to the DBE program, the test of congruency and proportionality demands that Congress provide a carefully documented pattern of persistent, widespread, unconstitutional discrimination by States in the award of its highway construction contracts. This Congress has failed to provide.

There was absolutely no evidence before Congress, nor did is purport to have any, of unconstitutionally discriminatory actions by the States in awarding their highway construction contracts to prime contractors. Without such evidence, Congress, therefore, lacked power under the Enforcement Clause of the Fourteenth Amendment to interfere with the sovereign power of the States in the manner in which they award prime contracts for intrastate highway construction.

VI. THE EIGHTH CIRCUIT'S DECISION INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL AND NATIONAL IMPORTANCE.

In 1989, in ***Croson***, this Court issued its definitive ruling on the proper application of strict scrutiny to racial preference contracting programs adopted by state and local governments. 488 U.S. at 469. This Court recognized then, as it had before and has since, that, despite the vision set forth by America's Founding Fathers in the Declaration of Independence, race remains a vexatious national issue. ***Id.*** at 505-506 ("[t]he dream was of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement"). Nonetheless, the Fourteenth Amendment's Equal Protection Clause mandates that when state or local governmental actors seek to distinguish between and among citizens on a basis as "inherently suspect" as "race or ethnic background", those actors must justify that "unequal treatment under the strictest judicial scrutiny." ***McLaughlin v. Florida***, 379 U.S. 184, 192

(1964); ***Adarand***, 515 U.S. at 224. Applying that test to the City of Richmond's program in ***Croson***, this Court held that program unconstitutional. 488 U.S. at 493-511. In 1995, in ***Adarand v. Peña***, this Court made clear that the "strict scrutiny" test applied in ***Croson*** applies to "all governmental actors" that adopt racial preference contracting programs.

In the fourteen years since this Court's decision in ***Croson***, no Circuit, other that the Tenth Circuit in 2000 and again in 2003, and the Eighth Circuit in 2003, has, after trial, found a racial preference program constitutional. As a result, many local governments, on their own or under threat of litigation, have abandoned the use of racial preferences.[1] However, and not surprisingly, local units of government view the Tenth Circuit's ruling as a basis for hope that they may maintain or even reinstitute the use of preferences in awarding of contracts.[2] Those local governments now have new hope because, relying almost exclusively on the Tenth Circuit's ruling, the Eighth Circuit has upheld the constitutionality of a federal racial preference program as imposed upon and implemented by a state government.

Thus, despite this Court's rulings in ***Croson*** and ***Adarand***, and the near decade and a half of Circuit Courts decisions constistent with it, the split among the Circuit Courts grows and the separation of two of the Circuit Courts from the clear intent of this Court in ***Croson*** and ***Adarand*** increases.

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[1] ***See, e.g.***, Stipulation, ***Lee General Contractors, et al. v. City of Atlanta, et al.***, C.A. no. 1:99-CV-2194-WBH (N.D. Ga., December 1, 2000); Richard Whitt, ***[Atlanta] bends in set-aside court fight: Refusal to argue constitutionality seen as strategy***, The Atlanta Journal-Constitution, D1 (December 7, 2000); ***Boston Abolishes Affirmative Action***, The Associated Press (February 10, 2003).

[2] Tom McGhee, ***Denver win in court sets a precedent: Other cities will cite case in affirmative action issues***, The Denver Post, C1 (February 12, 2003).

Unless this Court grants this petition and reaffirms its holdings in ***Croson*** and ***Adarand***, a return of the day when all governments may engage in the "pernicious" practice of racial preference in government contracting may be at hand. Some already speculate that this Court has abandoned the equal protection jurisprudence it so carefully crafted in those two decisions. Whatever is the case, in a vast region of the country, those rulings no longer apply.

The constitutional and national importance of the Eighth Circuit's decision necessitates a ruling by this Court.

CONCLUSION

For all of the above reasons, this Court should grant this Petition.

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No. 02-1665

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

345 F.3d 964; 2003 U.S. App. LEXIS 20287

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PRIOR HISTORY: [**1] Appeal from the United States Defendants - Appellees, District Court for the District of Minnesota. Appeal from the United States Nebraska Department of Roads, et al., District Court for the District of Nebraska. Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn., Nov. 14, 2001)

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

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For UNITED STATES DEPARTMENT OF TRANSPORTATION Appellees, THE FEDERAL HIGHWAY ADMINISTRATION Appellees, Intervenor - Defendant (02-3016): Matt Michael Dummermuth, U.S. DEPARTMENT OF JUSTICE, Washington, DC. Charlotte Burrows, U.S. DEPARTMENT OF JUSTICE Civil Right Division, Washington, DC. Sonay A.C. Rao, U.S. DEPARTMENT OF JUSTICE Civil Rights Division, Washington, DC. Sara R. Lewenberg, U.S. DEPARTMENT OF JUSTICE Civil Rights Division, Washington, DC. Teresa Kwong, U.S. DEPARTMENT OF JUSTICE Civil Rights Division, Washington, DC.

JUDGES: Before LOKEN, Chief Judge, FAGG and MURPHY, Circuit Judges.

OPINION BY: LOKEN

OPINION: [*967] LOKEN, Chief Judge.

Since 1982, the federal highway statutes have required that ten percent of federal highway construction funds be paid to small businesses owned and controlled by "socially and economically disadvantaged individuals," as that term is defined in *§ 8(d)* of the Small Business Act (*15 U.S. C § 637*). See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100. Two nonminority contractors filed these separate actions challenging the current statute and Department of Transportation (DOT) regulations, as implemented in Minnesota and Nebraska. In the Minnesota action, plaintiff Sherbrooke Turf, Inc. ("Sherbrooke"), sued the Minnesota Department of Transportation (MnDOT) and its Commissioner to enjoin this aspect of the State's federally-assisted highway program. In the Nebraska action, plaintiff Gross Seed Company [**2] ("Gross Seed") sued the Nebraska Department of Roads (NDOR) and its Director. n1 In each case, with the constitutionality of a federal statute at issue, the United States and DOT intervened as additional defendants. In the Minnesota action, the Associated General Contractors of America and its Minnesota affiliate appeared as amicus on behalf of plaintiff Sherbrooke.

> n1 *Eleventh Amendment* immunity may bar the claims against MnDOT and NDOR, which are state agencies, but the state officials may be sued for injunctive relief. See *Will v. Mich. Dept of State Police, 491 U.S. 58, 66-67, 71 n.10,105 L. Ed. 2d 45,109 S. Ct. 2304 (1989).*

Sherbrooke and Gross Seed provide landscaping services to prime contractors on federally assisted highway projects. In each lawsuit, the district court n2 held that the subcontractor plaintiff has standing to assert its constitutional claims. We agree. The stipulated facts demonstrate that Sherbrooke and Gross Seed have bid on federally assisted highway projects **[**3]** in the past, will continue to bid in the future, and suffer competitive harm when contracts are awarded to others under DOT's Disadvantaged Business Enterprises (DBE) program. **[*968]** See *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211-12, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995).* Turning to the merits, the district courts concluded that the DBE program as implemented in Minnesota and Nebraska satisfies strict scrutiny review, both facially and as applied, as the Tenth Circuit concluded following the Supreme Court's remand in Adarand. Adarand Constructors, Inc v. Slater, 228 F. 3d 1147 (10th Cir. 2000) (Adarand II), cert. granted the dismissed as improvidently granted, 532 U.S. 941, 534 U.S. 103 (2001). Sherbrooke and Gross Seed appeal, arguing the district courts erred in concluding that the federal DBE program satisfies strict scrutiny and in concluding that Minnesota and Nebraska need not establish that their implementation of the DBE program survives independent strict scrutiny review as well. We affirm.

n2 In the Minnesota action, the HONORABLE JAMES M. ROSENBAUM, Chief Judge of the United States District Court for the District of Minnesota. In the Nebraska action, the HONORABLE LYLE E. STROM, United State District Judge for the District of Nebraska.

[**4]

I. The Legislative Background.

Prior to the 1982 statute designating ten percent of federal highway funds for minority small business contractors, a comparable provision in the *Public Works Employment Act o f 1977 was upheld in Fullilove v. Klutznick*, 448 U. S. 448, 65 L. Ed. 2d 902,100 S. Ct. 2 758 (1980). However, the constitutionality of mandatory set-asides based on racial factors was placed in doubt by later Supreme Court's decisions -- *City of Richmond v. J. A. Croson Co., 488 U.S. 469, 498-99,102 L. Ed. 2d 854,109 S. Ct. 706 (1989)*, which struck down the City's thirty percent set-aside for minority small businesses, and Adarand, which held that all government race-based classifications are subject to strict judicial scrutiny. 515 U.S. at 235. Following Adarand, the District of Minnesota invalidated the statutory ten percent set-aside of federal highway funds and DOT's then-existing regulations, "as applied to highway construction contracts in the State of Minnesota." In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026, 1037-38 (D. Minn. 1998). As a result, the DBE program was suspended in Minnesota [**5] in 1999.

In the wake of these judicial decisions, Congress passed the *Transportation Equity Act for the 21st Century* ("TEA-21 "), which continued the ten percent designation subject to DOT implementation. Pub. L. No. 105-178, § 1101(b)(1), 112 Stat.107, 113. DOT then promulgated the new implementing regulations here at issue in *49 C.F.R. pt. 26. See 64 Fed. Reg. 5096 (Feb. 2, 1999).*

The revised DBE program provides contracting advantages to small businesses owned and controlled by "socially and economically disadvantaged individuals." "Socially disadvantaged individuals are those who have been

subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *15 U.S.C. § 637(a)(6)(A)*. In determining whether a contractor qualifies [**6] as a DBE, grantee States must employ a rebuttable presumption that women and members of most racial minority groups are socially and economically disadvantaged. See TEA-21, 1101(b)(2)(B), 112 Stat. at 113, incorporating 15 U.S. C. 63 7(d)(3)(C) and 13 C. F. R. § 124.103(b). An individual whose personal net worth exceeds $ 750,000 is not economically disadvantaged. See 49 C.F.R. § 26.67(b). Small businesses do not qualify if their earnings exceeded $16.6 million per year in the previous three fiscal [*9691 years. TEA-21 § 1101(b)(2)(A), 112 Stat. at 113.

II. Strict Scrutiny Review.

Sherbrooke and Gross Seed contend that the federal highway DBE program, on its face and as applied in Minnesota and Nebraska, violates the equal protection component of the Fifth Amendment's Due Process Clause. Adarand established that a federal program employing race-based classifications or remedies "must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227. n3 Though the DBE program confers benefits on "socially and economically disadvantaged individuals," a term that is facially **[**7]** race-neutral, the government concedes that the program is subject to strict judicial scrutiny, no doubt because the statute employs a race based rebuttable presumption to define this class of beneficiaries and authorizes the use of race-conscious remedial measures. See Adarand, 515 U.S. at 212-13. n4 Thus, the statute's race-based measures "are

constitutional only if they are narrowly tailored to further compelling governmental interests." Grutter v. Bollinger, 156 L. Ed. 2d 304, 123 S. Ct. 2325, 2337-38 (2003). The Court has cautioned courts conducting this review that strict scrutiny is rigorous but not always "fatal in fact." Adarand, 515 U.S. at 237 (quotation omitted).

> n3 Although TEA-21 is in part an exercise of Congress's power under the *Spending Clause*, that does not affect the constitutional analysis. "Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the *Fifth Amendment*." *Fullilove, 448 U.S. at 480* (plurality opinion); see *United States v. Am. Library Assn, 'Inc., 156 L. Ed. 2d 221,123 S. Ct. 2297, 2303 (2003).* **[**8]**

> n4 However, the fact that the program is tailored to disqualify minority-owned enterprises that are not truly disadvantaged is relevant to the narrow-tailoring aspect of strict scrutiny analysis. Cf. *Adarand, 515 U.S. at 259-62 (Stevens, 3., dissenting).*

A. Compelling Governmental Interest.

To survive strict scrutiny, the government must first articulate a legislative goal that is properly considered a compelling government interest. Neither Sherbrooke nor Gross Seed challenges the district courts' conclusion that Congress and DOT acted to further a compelling interest. As the Tenth Circuit said in Adarand II, "we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets

created by its disbursements." 228 F.3d at 1165; accord Croson, 488 U.S. at 492.

In addition to identifying a compelling government interest, the government must demonstrate **[**9]** a "strong basis in the evidence" supporting its conclusion that racebased remedial action was necessary to further that interest. "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson, 488 U.S. at 500.* Sherbrooke and Gross Seed argue that Congress lacked strong evidence supporting its conclusion that race-based classifications and remedial measures were necessary. They argue that, in enacting TEA-21, Congress had no "hard evidence" of widespread intentional race discrimination in the contracting industry, relying instead on misrepresentations contained in "Appendix I," a Department **[*970]** of Justice summary of more than fifty documents and thirty congressional hearings on minority-owned businesses prepared in response to the Adarand decision. See Appendix-- The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26050 (May 23, 1996). Sherbrooke and Gross Seed point to Government reports and their own expert's report questioning the persistence of racial discrimination in highway construction and argue that we must conduct a de **[**10]** novo review of this legislative record.

We agree we must take a hard look at the evidence, and we have done so. We conclude that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand 11, 228 F. 3d at 1167-76.* As the Tenth Circuit's analysis demonstrates, Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry. In

rebuttal, Sherbrooke and Gross Seed presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minorityowned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground. See *Rothe Dev. Corp. v. U.S. Dept' of Def, 262 F. 3d 1306, 1317 (Fed. Cir. 2001).*

Finally, Sherbrooke and Gross Seed argue that MnDOT and NDOR must independently **[**11]** satisfy the compelling government interest aspect of strict scrutiny review. Under the prior law -- when the ten percent federal set-aside was more mandatory and Fullilove, not strict scrutiny, provided the governing constitutional principle -the Seventh Circuit held that a contractor who conceded the validity of the federal program could not challenge a grantee State for "merely complying with federal law." *Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 423 (7th Cir.), cent. denied, 500 U.S. 954, 114 L. Ed. 2d 714,111 S. Ct. 2261(1991); accord Harrison & Burrowes Bridge Constructors, Inc. v Cuomo, 981 F.2d 50, 57 (2d Cir.1992); Ellis v. Skinner, 961 F. 2d 912, 915 (10th Cir.), cert. denied, 506 U.S. 939 (1992); Tenn. Asphalt Co. v. Farris, 942 F. 2d 969, 975 (6th Cir.1991).* Based on this precedent, the government argues, and the district courts agreed, that participating States need not independently meet the strict scrutiny standard because under the revised DBE program the State must still comply with the DOT regulations. Sherbrooke and Gross Seed respond that [**12] the prior cases are distinguishable, and Minnesota and Nebraska DBE programs must independently satisfy strict scrutiny under Croson, because the present TEA-21 regime "is characterized by state discretion throughout." This issue was not addressed by the Tenth Circuit in Adarand II.

We conclude that neither side's position is entirely sound. Compelling government interest looks at a statute or government program on its face. When the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation. Thus, we reject appellants' **[*971]** contention that their facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where **[**13]** its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis.

B. Is the Revised DBE Program Narrowly Tailored?

In addition to determining that a race-based measure serves a compelling government interest, a reviewing court applying strict scrutiny must determine if the measure is narrowly tailored, that is, whether "the means chosen to accomplish the government's asserted purpose [are] specifically and narrowly framed to accomplish that purpose." *Grutter, 123 S. Ct. at 2341* (quotation omitted). Sherbrooke and Gross Seed have the ultimate burden of establishing that the DBE program is not narrowly tailored. See *Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 293, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (O'Connor, J., concurring); Rothe, 262 Fad at 1317.* While our compelling interest analysis focused on the record before Congress, the narrow-tailoring

analysis looks at the roles of the implementing **[**14]** highway construction agencies.

1. Appellants' facial challenge to the DBE program requires us to look carefully at DOT's regulations to determine whether they may be constitutionally applied under any set of factual circumstances. See *United States v. Salerno, 481 U.S. 739, 746, 95 L. Ed. 2d 697,107 S. Ct. 2095 (1987)* (standard for facial challenges). In determining whether a raceconscious remedy is narrowly tailored, we look at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. See *United States v. Paradise, 480 U.S. 149, 171, 187, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987)* (plurality and concurring opinions).

Under the revised DBE program, a State receiving federal highway funds must, on an annual basis, submit to DOT an overall goal for DBE participation in its federally funded highway contracts. See *49 C.F.R. § 26.45(f)(1).* The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able **[**15]** to participate as contractors or subcontractors on federally-assisted contracts. *49 CFR. § 26.45(b).* The number may be adjusted upward to reflect the State's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. See *49 C.F.R. § 2645(d).* The State must meet the "maximum feasible portion" of its overall goal through raceneutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. See *49 C.F.R. § 26.51(a), (c).* If race-neutral means are projected to fall short of achieving the overall goal, the State must give preference to firms it has certified as DBEs. However, such preferences may not include quotas, and set-aside contracts are limited to those instances "when no other method could be reasonably

expected to redress egregious instances of discrimination." *49 CF.R. § 26.43(b).* During the course of a year, if a State determines that it will exceed or fall short of its overall [*972] goal, it must adjust its use of race-conscious and race-neutral methods **[**16]** "to ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." *49 CFR. § 26.51(f).*

The regulations expressly declare that the statutory ten percent provision "is an aspirational goal at the national level," not a mandatory requirement for grantee States. *49 CFR. § 26.41(b).* Thus, absent bad faith administration of the program, a State's failure to achieve its overall goal will not be penalized. See 49 C.F.R. § 26.47. If the State meets its overall goal for two consecutive years through raceneutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. See *49 C.F.R. § 2651(f)(3).* In addition, DOT may grant an exemption or waiver from any or all requirements of the program. See *49 C.F.R. § 26.51(b).*

Like the district courts, we conclude that the DOT regulations, on their face, satisfy the Supreme Court's narrow tailoring requirements. First, the regulations place strong emphasis on "the use of race-neutral means to increase minority business **[**17]** participation in government contracting." *Adarand, 515 U.S. at 237-38* (quotation omitted). "Narrow tailoring does not require exhaustion of every conceivable raceneutral alternative," but it does require "serious, good faith consideration of workable race-neutral alternatives." *Grutter, 123 S. Ct. at 2344-45.* The regulations also prohibit the use of quotas and severely limit the use of set-asides. See *Croson, 488 U.S. at 496* (discussing quotas.

Second, the revised DBE program has substantial flexibility. A State may obtain waivers or exemptions from any requirement and is not penalized for a good faith failure

to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000 cannot qualify as economically disadvantaged. See *49 C.F.R. § 26.67(b).* Likewise, the DBE program contains built-in durational limits. A State may terminate its DBE program if it meets its annual overall goal through race-neutral means for two consecutive years. *49 CFR. § 26.51(f)(3).* Moreover, **[**18]** TEA-21 is subject to periodic congressional reauthorization. Periodic legislative debate "assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Grutter, 123 S. Ct. at 2346* (quotation omitted).

Third, DOT has tied the goals for DBE participation to the relevant labor markets. The regulations require grantee States to set overall goals based upon the likely number of minority contractors that would have received federally assisted highway contracts but for the effects of past discrimination. *See 49 C.F.R. § 26.45 (c)-(d)* (Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in Croson, which "rested upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *24* (quotation omitted). **[**19]**

Finally, Congress and DOT have taken significant steps to minimize the racebased nature of the DBE program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While **[*973]** TEA21 creates a rebuttable presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and

wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor. See *Grutter, 123 S. Ct. at 2345-46; Gratz v. Bollinger, 156L. Ed. 2d 257,123 S. Ct. 2411, 2429 (2003)* (criticizing a University of Michigan program that automatically awarded twenty points to minority applicants, without individualized consideration). For these reasons, we agree with the district courts that the revised DBE program is narrowly tailored on its face.

2. Sherbrooke and Gross Seed also argue that the revised DBE program as applied in Minnesota and Nebraska is not narrowly tailored. **[**20]** As noted previously, because the revised DBE program affords grantee States substantial discretion, this contention requires us to examine the program as implemented by those States. Under the revised federal program, States "set their own goals, based on local market conditions; their goals are not imposed by the federal government nor do recipients have to tie them to any uniform national percentage." *64 Fed. Reg. at 5102.*

Minnesota. Following promulgation of the current DOT regulations, MnDOT commissioned National Economic Research Associates (NERA) to study the highway contracting market in Minnesota. NERA first determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in the highway construction market. See *49 C.F.R. § 2645(c)* (Step 1). Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, NERA next estimated that the number of participating minorityowned businesses would be 34 percent higher in a race-neutral market. Therefore, NERA adjusted its DBE availability figure from 11.4 to 11.6 percent. See *49 CFR. § 26.45(c)* **[**21]** (Step 1). Based on NERA's study, MnDOT adopted an overall

goal of 11.6 percent DBE participation for federally assisted highway projects in fiscal year 2001. MnDOT predicted that it would need to meet nine percent of that overall goal through race- and gender-conscious means, based on the fact that DBE participation in state highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999, when its previous DBE program was suspended by the district court's injunction in Sherbrooke. To meet its overall goal, MnDOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs. MnDOT determines that portion based on several individualized factors, including the availability of DBEs and the extent of subcontracting opportunities on the project.

DOT approved this MnDOT program for Fiscal Year 2001. Sherbrooke presented evidence attacking the reliability of the data NERA used in determining its recommended overall goal. But Sherbrooke failed to establish that better data was available or that MnDOT was otherwise unreasonable in undertaking this thorough analysis and in relying on its results. The precipitous drop **[**22]** in DBE participation in 1999, when no raceconscious methods were employed, supports MnDOT's conclusion that a substantial portion of its 2001 overall goal could not be met with race-neutral measures, and there is no evidence that MnDOT failed to adjust its use of race-conscious and race-neutral methods as the year progressed, as the DOT regulations require. On this record, **[*974]** we agree with the district court that the revised DBE program serves a compelling government interest and is narrowly tailored, on its face and as applied in Minnesota. Accordingly, the court properly granted summary judgment dismissing Sherbrooke's claims.

Nebraska. To implement the revised federal DBE program, NDOR commissioned MGT of America, Inc., to conduct availability and capability studies of DBE firms in the Nebraska highway construction market. The availability

study found that between 1995 and 1999, when Nebraska followed the then-mandatory ten percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.67 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting **[**23]** decisions, MGT recommended that NDOR set an overall goal of 9.95 percent DBE participation and predict that 4.82 percent of this overall goal would have to be achieved by race- and genderconscious means. NDOR adopted these recommendations in its submission to DOT for Fiscal Year 2001. NDOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. DOT approved this NDOR program for fiscal year 2001. Having carefully reviewed the trial record, we conclude that Gross Seed, like Sherbrooke, failed to prove that the revised DBE program is not narrowly tailored as applied in Nebraska. Accordingly, the district court properly entered posttrial judgment dismissing Gross Seed's claims.

The judgments of the district courts are affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
00-CV-1026(JMR/RLE)

Sherbrooke Turf, Inc.	)	
	)	
v.	)	ORDER
	)	
Minnesota Department of Transportation et. al.	)	

This matter is before the Court on the parties' cross-motions for summary judgment. Plaintiff asks the Court to find a federal statute broadening participation inroad construction, maintenance and repair, and Minnesota's program implementing that. statute, unconstitutional. Defendants ask the Court to find the Act and the Minnesota program in accord with the Constitution, and seek a dismissal of plaintiff's case.

For the reasons set forth below, defendants' motions are granted; plaintiff's motions are denied.

I. Background

A. The Parties

Sherbrooke Turf, Inc. ("Sherbrooke") is a Minnesota corporation which provides landscaping services for land adjacent to highways. In order to be selected as a highway subcontractor, it submits bids on federally funded highway construction projects in this state. Sherbrooke is owned, and operated by Caucasian males. Defendants are the Minnesota Department of Transportation. ("MnDOT") and Elwyn Tinklenberg, in his capacity as Minnesota's Commissioner of Transportation. The United States of America, the United States Department of Transportation ("USDOT"), and the

Federal Highway Administration ("FHA") have been permitted to intervene as defendants.

Sherbrooke claims the Disadvantaged Business Enterprise ("DBE") provisions of the Transportation Equity Act for the 21st Century ("TEA-21" are unconstitutional. Sherbrooke challenges the federal affirmative action programs. See In re Sherbrooke Sodding Co., 17 F. Supp.2d 1026, 1028 (D. Min. 1998) Sherbrooke also challenges USDOT's implementing regulations, and MnDOT's participation in the DBE-program. Plaintiff claims. that because of its male-Caucasian ownership, it suffers a constitutional injury when bidding on Minnesota's federally funded road construction projects. Finally, Sherbrooke claims the DBE program is both facially unconstitutional and unconstitutional as applied.

B. Predecessors To The Federal Statute - TEA-21

TEA-21 is the latest in a series of federal highway funding acts first enacted in 1982, when Congress passed the Surf ace Transportation Assistance Act ("STAA"), Pub. L. No. 97-424, 96 Stat. 2097. Section 105(f) of the STAR required that not less than 10% of its appropriated funds be expended on small businesses called DBEs, owned and controlled by socially and economically disadvantaged individuals as defined by Section 8(d) of the Small Business Act. See 96 Stat. 2100.

The STAA defined DBEs by referring to the Small Business Act ("SBA"). The SBA, at 8(d), identifies classes of individuals who are presumed to be socially and economically disadvantaged. It provides "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans." 15 U.S.C. § 637 (d) (1).

In 1987, Congress passed a second highway funding act, the Surface Transportation Uniform Relocation Assistance Act ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132. It, too, contained language designed to broaden participation in highway construction. At § 106(c), STURAA directed that not less than 10% of appropriated federal funds be expended through DBEs. The STURAA expanded the SBA's definition of DBEs to include women who, by congressional ukase, also became presumed-to-be socially and economically disadvantaged. See 101 Stat. 145-146.

In 1991, Congress enacted a third statute, the Intermodal Surface Transportation Efficiency Act ("ISTEA"); Pub. L. No. 102-240, 105 Stat. 1914. In ISTEA, Congress again directed recipientstates to assure that not less than 10% of its highway construction funds were expended through DBEs. This Act maintained the STURAA' s DBE. definitions. Sherbrooke challenged ISTEA on constitutional grounds, and this Court found. ISTEA to be unconstitutional. See Sherbrooke I, 17 F. Supp. 2d at 1037.

II. The Present Dispute

Congress enacted TEA-21 in 1998. Pub. L. No. 105-178, 112 Stat. 107 (1998). At 1101 (b), Congress again calls upon states to expend not less than 10% of their federal highway funds on DBE-provided services. TEA-21 maintains STURAA's designation of women as presumed socially and economically disadvantaged. See 101 Stat. 146, 112 Stat. 107. It also incorporates the SBA's. definitions of other disadvantaged persons. 15 U.S.C. § 637(d) (1).

A. Federal Regulations

USDOT promulgated federal regulations to implement TEA-21's DBE program. See 49 C.F.R. Part 26. Under these regulations, the recipient-state's receipt of federal highway

funds is conditioned on the state's establishing a DBE program. See id.; 49 C.F.R. § 26.21. USDOT monitors state implementation of the DBE program by reviewing state decisions and goals pursuant to regulation Part 26. Section 26.41 defines TEA-21's statutory 10% goal as follows.

> (a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
> (b) This 10 percent. goal is an aspirational Goal at the national level, which the Department uses as a tool in evaluating and monitoring DBE's opportunities to participate in DOT-assisted contracts.
> (c) The national. 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

49 C.F.R. § 26,41 (emphasis added).

USDOT has also established standards to guide states in setting goals and structuring their DBE programs. See 49 C.F.R. § 26.45 ; see also 112 Stat. 1101(b) (3) (requiring states to annually survey and compile records related to DBEs). This includes guidelines for state determination of the appropriate local percentage goal. See 49 C.F.R. § 26.45. Under the regulations, if a state's annual projected goal can be achieved through race-neutral means, the state must implement its contract without including goals during that year. See 49 C.F.R. § 26.51(f). The regulations encourage states to meet their DBE goals through race-neutral measures, see 49 C.F.R. § 26.51(a), and further indicate that as long as a state implements its DBE program in good faith, no penalty will be imposed for a failure to meet the aspirational goal, see C.F.R. § 26.47 (a) and (b).

B. Minnesota's DBE Program

Minnesota's DBE program was put in place pursuant to 49 C.F.R. § 26.45 following passage of TEA-21 in 1998. The federal regulations require that MnDOT's DBE program consider the number and types of certified DBEs in the area, and their readiness and. ability to bid on construction contracts. See 49 C.F.R. § 26.45. This includes studying the DBEs' ability to obtain funding and bonding; collating data on employment programs; obtaining evidence from locally conducted disparity studies, and considering the effects of any ongoing DBE programs. See id. MnDOT also evaluates the number of contracts it anticipates awarding during the upcoming year.

MnDOT has set an 11.6% overall goal for DBE Participation. Under Part 26 of the federal regulations, it determined it could meet 2.6% of its participation goal using race and gender neutral means, including selecting DBEs based on the lowest bid; the remaining 9% of its goal was to be met through contract goals. To implement these highway contracting goals, Minnesota required each prime contract-bidder to provide evidence showing it either subcontracted to DBEs in order to meet the contract goal, or engaged in a good faith effort to meet it. See 49 C.F.R. § 53.

C. The Proiects At Issue

Sherbrooke submitted bids for. landscaping on two federally assisted highway projects--"Stearns" and "Ottertail." MnDot set a DBE participation goal of 10% for the Stearns project, and a goal of 1.2% for the Ottertail project.

Sherbrooke claims it submitted the-lowest bid for the Stearns project at $30,000 The prime contractor, Lunda

Construction Co., awarded the job to Lawn & Driveway Service, Inc., a certified DBE, despite an arguably higher bid. Ottertail's prime contractor also. awarded its highway sodding work to Lawn & Driveway Service, Inc. Sherbrooke claims that, although Lawn & Driveway Service's bid was lower, it did not include traffic control services which are often necessary. According to Sherbrooke, its bid included these services, making its bid the lowest.

Sherbrooke claims its Caucasian-male Ownership, which denied it DBE status, unlawfully encumbered its right to be selected for these jobs. Sherbrooke states it will continue to compete for subcontracting work on future federal highway projects, which will necessarily require it to compete with DBEs. Plaintiff estimates it bids on 200 projects each year; however, it does not indicate. how many bids are successful, nor does it state the number of projects 'it secures against bids by certified DBEs:

C. The Claim

MnDOT's DBE program is, both facially and as applied, designed to increase federal highway construction participation by individuals and companies on the basis of race, sex, or national origin. Sherbrooke claims this program violates the Equal Protection Clause of the United States Constitution; its civil rights under 42 U.S.C. § 1981, § 1983, and § 2000(d); and. Article I, § 2 of the Minnesota Constitution.

III. The Adarand Principle

The United States Supreme Court has established a "strict scrutiny" test to be applied to race-conscious remedial legislation. But it has carefully emphasized that strict scrutiny should not be considered "strict in scrutiny, but fatal in fact." See Adarand Constructors, Inc. v. Pena, 515 U.S.

200, 237, 115 S. Ct. 2097 (1995) [hereinafter, Adarand III]. when analyzing Adarand III 's race-conscious congressional enactment, the Court noted that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." See id.

While recognizing. the constitutional validity of federally enacted rage-conscious programs, Adarand III makes clear that federally enacted race-conscious preference programs, as well as state and locally enacted affirmative action programs, are subject to this "strict scrutiny" analysis. 515 U.S. at 235, 115 S. Ct. 2097; see also City of Richmond v. J. A. Croson Co., 488 U.S. 469, 508, 511, 109 S. Ct. 706 (1989) (applying strict scrutiny to local and state programs). The Adarand III Court found that "[f)ederal racial classifications, like those of a state, must serve a compelling interest, and must be narrowly tailored to further that interest." Adarand III, 515 U.S. at 235, 115 S. Ct. 2097.[1] Congressional enactments, said the Court, would receive no special deference. See id. at 218.

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[1] TEA-21's DBE program covers not only race and national origin, but also includes gender based preferences. It appears that a slightly different analytic may apply to gender-based classifications. In examining gender-based preferences, the government must show "at least that the [challenged] classification serves, important' governmental objectives. and that the discriminatory means employed' are `substantially - related to the achievement of those objectives.'" United States v. Virginia, 518 U.S. 515, 533, 116 S. Ct. 2264 (1996) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U. S. 142, 150, 100 S. Ct. 1540 (1980)). This intermediate test is less stringent than the race-focused strict scrutiny standard. For purposes of this motion, the Court applies the more stringent standard to TEA-21 and its DBE. program. As the program.

A. Summary Judgement Standard

Summary judgment is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed: R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317; 322-23, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246, 106 S. Ct. 2505 (1986). There are no disputed material facts in this case; the matter turns on a pure question of law, and summary judgment is appropriate.

B. Strict Scrutiny Applied

The TEA-21 statute, its implementing regulations, and Minnesota's DBE program permit consideration of race, national origin, and gender in deciding whether certain subcontractors will obtain work on transportation related construction projects. As such, the government bears the burden of showing the DBE program is constitutional. See Adarand III, 515 U. S. at 223; 115 S. Ct. 2097; United States v. Virginia, 518 U.S. 515, 533, 116 S. Ct. 2264 (1996).

See also Adarand Constructors, Inc. v. Slater, 228 F. 3d 1147, 1161-64 (10th Cir. 2000) (rewiewing the constitutionality of the race-conscious provisions In TEA-21) [hereinafter Adarand VII]

1. Compelling Government Interest

The United States Claims the Tenth Circuit Court of Appeals was correct when it stated in Adarand VII: "[The federal government has a compelling interest in not perpetuating the affects of racial discrimination in its own distribution of federal funds and in remediating the effects of

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survives strict scrutiny, consideration of a lower standard of scrutiny' is unnecessary.

past discrimination in the government contracting markets created by its disbursements." 228 F.3d at 1165. The United States makes two arguments in this regard. First, it argues Congress properly considered and developed a detailed legislative history leading to its finding of a compelling interest; second, that the Tenth Circuit made a sufficiently comprehensive analysis of Congress's legislative history when it upheld the program.

According to the United States., the Tenth Circuit, , In Adarand VII, was correct when it found Congress had adequately considered the question of discrimination against minority subcontractors. The Tenth Circuit stated that Congress recognized:

> (1) evidence from the congressional record wherein Congress repeatedly considered the issue of discrimination in government construction procurement contracts; (2) statements of legislators during debate on TEA-21. . .; (3) local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs; and [(4)] evidence relating to numerous congressional in-vestigations, hearing, and outside studies containing statistical and anecdotal, evidence.

(United States, Mem. Summ. J., p. 10.)

The "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation [i]s whether there exists a strong basis in evidence for [the government's] conclusion that remedial action was necessary." See Adarand VII, 228 F.3d at 1166 (quoting Concrete Works, 36 F.3d 1513, 1521 (10th Cir. 1994) (citations omitted)) (emphasis in Concrete Works). To meet thisstandard, Congress must legislatively find "constitutional

or statutory violations." Croson, 488 U.S. at 497, 109 S. Ct. 706 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307, 98 S. Ct. 2733 (1978)).

Congress may not merely express concern about such issues; it must make findings describing the problem's existence and the specific cure it prescribes. "Only then does the government have a compelling interest in favoring one race over another." See Croson, 488 U.S. at 497; 109 S. Ct. 706. The evidence used to justify a race-conscious program must have been considered prior to enactment of the legislation in question. See Rothe Dev. Corp. v. United States Dept. of Defense, 262 F.3d 306, 327-28 (Fed. Cir. 2001).

In the case of TEA-21, the Court finds Congress has complied with these requirements. Before adopting the Act, Congress considered evidence detailing the barriers faced by minority-owned construction firms and the specific nature of discrimination within. the construction and subcontracting industry. See Adarand VII, 228 F.3.d at 1168-72. Congress also reviewed a number of state and local disparity studies describing local construction subcontracting. Markets and the effects of affirmative action programs and discrimination within these markets. Lastly, Congress reviewed evidence describing a significant statistical disparity in DBE and minority subcontracting in markets in the absence of affirmative action programs Congress compiled this information in The Compelling Interest for Affirmative Action: A Preliminary Survey. 61 Fed. Reg. 26042, 26050 (May 23, 1996).

The Tenth Circuit painstakingly reviewed the congressional findings related to the passage of TEA-21. See Adarand VII, 228. F 3d 1166-75. After doing so, it found the evidence "only reinforces the conclusion that 'racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's

contracting markets." Id. at 1175 (quoting The Compelling Interest, 62 Fed. Reg. at 26,062). The Tenth Circuit found the "evidence demonstrates that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises . . . are caused either by continuing discrimination or the lingering effects of past discrimination in the relevant market.", Id. at. 1175-76; see also id. at 1176 ("We conclude that the evidence cited by the government and its amici, particularly that contained in The Compelling Interest; 61 Fed. Reg. 26,050, more than satisfies the government's burden of production regarding the compelling interest for a race-conscious remedy.")

Sherbrooke claims the Tenth Circuit's review of the congressional findings was insufficiently rigorous and asks this Court to conduct a more probing inquiry. Plaintiff claims the United States Supreme Court's decision in Kimel v. Florida Bd. of Regents mandates an independent judicial assessment of the data Congress reviewed prior enacting TEA-21. See 528 U.S. 62, 81, 120 S. Ct. 631 (2000).

Plaintiff is wrong; Kimel is a case which questioned whether Congress had compiled sufficient findings to pierce a state's Eleventh Amendment sovereign immunity. This is not such a case. While the Supreme jurisprudence may require a close look behind congressional findings, this rule is plainly limited to questions of state-federal sovereign immunity and protecting states from federal suits by their own citizens to enforce federally imposed rights.

Congress's attempts to address race and gender issues -- invoking its Commerce Clause and Fourteenth Amendment powers -- are readily distinguishable from actions which might abrogate sovereign immunity. The Supreme Court emphasized this point in City of Boerne v. Flores, when it said "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the

guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." 521 U. S. 519, 536, 117 S. Ct. 2157 (1997) (quotations omitted); see also Kimel, 528 U.S. at 83, 120 S. Ct. 631 (finding that congressional action remedying race or gender requires greater deference than action addressing age discrimination, which lacked the "history or purposeful unequal treatment"); United States v. Lopez, 514 U.S. 549, 563-64, 1.15 S. Ct, 1624 (1995) (noting that Congress need not make particularized findings in order execute its Commerce Clause powers).

Plaintiff's ultimate request, that this Court review every document considered by Congress to independently determine the validity and worthiness of the compelling interest, is fatally flawed. This Court has no reason to suspect or doubt either the Tenth Circuit's or Congress's ability to ascertain and understand evidence related to the need for affirmative action in federal highway construction programs. If the Court were to do as plaintiff demands, and reconsider every piece of-evidence" presented to Congress -- thereby determining for itself whether the evidence presented a compelling interest -- this Court would impermissibly trench upon the legislative duties reserved to Congress in Article I of the United States Constitution.

Instead, the Court must look at the record produced by Congress to determine if Congress enacted TEA-21 on the basis of strong evidence. The record makes clear that Congress had a sufficient evidentiary basis on which to conclude that the persistence of racism and discrimination in highway subcontracting warranted a race-conscious procurement program. Its conclusion sufficiently satisfies the compelling interest requirement.

2. Narrowly Tailored

Once the United States establishes that a race conscious program serves a compelling government interest, it must next show the program is narrowly tailored to serve the established interest. See Adarand III, 515 U.S. 115 S. Ct. 2097.

> This analysis considers several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of' waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

United States v. Paradise, 480 U.S. 149, 171, 107 S. Ct. 1053 (1987) (plurality); see also id. at 187, 107 S. Ct. 1053 (Powell, J.,concurring).[2]

a. Consideration of Race-Neutral Alternatives

Part of the narrow tailoring requirement asks "whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government

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[2] Justice Powell listed similar factors in his concurrence in United States v. Paradise, 480 U.S. at 187, 107 S. Ct. 1053:

> (i) the efficacy of alternative remedies; (ii) the planned duration. of the remedy; (iii) the. relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties.

contracting." Adarand III, 515 U.S. at 237-38, 115 S. Ct. 2097 (quoting Croson, 488 U.S. at 507, 109 S. Ct. 706). In this case, race-neutral means were clearly considered.

In Sherbrooke I, this Court considered ISTEA and its DBE program, and found that both Congress and USDOT failed to consider race-neutral alternatives. See 17 F. Supp. 2d at 1035. That failure contributed to this Court's finding that ISTEA's DBE program was "Constitutionally flawed." Id. But before passing TEA-21, Congress specifically considered adopting race-neutral alternatives to a. race-conscious program. See Report of the Committee on Transportation and Infrastructure, Report 105-467, Part 1, March 25, 1998, at 504-05.

TEA-21's implementing regulations reveal a heightened commitment to incorporating race-neutral elements in the DBE program. For example, 49 C.F.R. § 26.51 requires states to "meet the maximum feasible portion of (their] overall goal by using race-neutral means of facilitating DBE participation." 49 C.F.R. § 26.51(a); see also 49 C.F.R. § 26.51(f) (requiring contractors to implement the program using only race-neutral means when possible).

The regulations list a number of race-neutral measures to be used when awarding subcontracts. See 49 C.F.R. § 26.51 (b); see also Croson, 488 U.S. at 509-10, 109 S. Ct. 706 (suggesting types of race-neutral alternatives to be employed in administering a constitutional DBE program). TEA-21's emphasis on 's emphasis on alternatives to. race-conscious subcontracting -- as emphasized in the regulations -- demonstrate that both Congress and USDOT considered race-neutral alternatives in a fashion which compels the Court to find this a narrowly tailored program.

b. Limited Duration

Another narrow tailoring consideration asks whether a DBE program is "appropriately limited such that it `will not last longer than the discriminatory effects it is designed to eliminate.'" Adarand III, 515 U.S. at 238, 115 S. Ct. 2097 (quoting Fullilove, 448 U.S. 448, 513, 100 S. Ct. 2758 (1980)). Plaintiff claims MnDOT failed to fully evaluate. the extent of discrimination within the state, and as a result, neither the federal program nor the MnDOT program is narrowly tailored to end when discriminatory effects cease to be a problem.

The Tenth Circuit, in reviewing TEA-21, focused on the time limits for the DBE certification program. See Adarand VII, 228 F.3d at 1179-80; see also 15 U. S.C. §§ 634(b) (6), 636(j) (10) (C) (i) , 6:37 (a) , (d). The Circuit Court found two certification provisions significant First, each DBE is limited by regulation to approximately 10 ½ years in the program; second, the program requires annual certification of each DBE's financial and contracting records to prove continuing eligibility: See Adarand VII 228. F. 3d at 1179. Because each state sets its particular overall goal based in part on the availability and needs of local DBEs, see 49 C.F.R. § 26.45, the certification limits tailor the program's duration to local needs.

The United States and USDOT emphasize that TEA-21's DBE provision expires in 2004. See Police Officers' Federation of Minneapolis v. City of Minneapolis, 2001 WL 856021, *8 (D. Minn July 17, 2001) (finding plan limited in duration when it includes within its terms a termination trigger). MnDOT also notes the federal regulations providing for termination of TEA-21's DBE program when a participating state meets its annual overall goals through race-neutral means in two consecutive years. See 49 C. F. R. § 26.51(f) (3). In other words, once a state has secured

minority-subcontractor participation without the use of race-conscious means, the DBE program is discontinued.

Defendants' arguments are persuasive:: TEA-21 is materially different from statute the court found unconstitutional in Sherbrooke I. In TEA-21, Congress, USDOT, and MnDOT have undertaken of f orts to link .the DBE program's duration to its success. Its duration-limiting provisions support its constitutionality.

c. Burden

The Court must also consider whether the construction industry's non-DBE subcontractors shoulder an unconstitutional burden as a result of TEA-21's affirmative action program. See Fullilove, 448 U.S. at 485, 100 S. Ct.' 2758 (balancing the burden shouldered by non-minority firms against the overall construction contacting. opportunities). A DBE program can place a significant burden on non-DBE companies. But TEA-21 responds to this problem through its narrow tailoring and time limitations. See Sherbrooke I , 17 F. Supp. 2d at 1036 ("When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible.") (quoting Fullilove, 448 U. S. at 484, 100 S. Ct. 2.758).

TEA-21 also limits this burden by broadening the DBE program to increase the participation of non-minority DBEs. Under the regulations, DBE status is available to a broader group than those possessing racial, national origin, or gender classifications which Congress presumes disadvantaged. See 49 C.F.R. § § 26.61(d) , 26.67(d); 13 C.F.R. § 124.105 (c) (1); see also Adarand VII, 228 F.3d at 1183. By utilizing an economic -- as contrasted to strictly birth-tied -- standard, the program increases DBE subcontracting through race-neutral means. The regulations also require states to monitor the

number and type of DBEs in order to prevent over-concentration. 49 C.F.R. § 26.33. Although non-DBE contractors must inevitably bear some burden under TEA-21, USDOT and MnDOT have sufficiently linked. the DBE program to evidence of discrimination and reduced the shared burden to a constitutionally permissible level.

d. Flexibility

Sherbrooke claims MnDOT's DBE program is inflexible, because it can force a prime contractor to accept a higher subcontracting bid if the price difference between the DBE and non-DBE bid is not "excessive" or "unreasonable." According to plaintiff, the program's aspirational goals are overly restrictive, and therefore unconstitutional. To support this position, Sherbrooke cites this Court's, decision in Sherbrooke I. See 17 F. Supp. 2d at 1037. The United States, USDOT and MnDOT deny the program is inflexible. Defendants are correct.

Unlike the USDOT's predecessor program, neither MnDOT's implementing regulations nor TEA-21 includes rigid quotas. Instead, under the new program language, quotas are explicitly forbidden. See 49 C.F.R. 26.43. Although each state is required to set overall goals based on its local situation, see 49 C.F.R. 26.45, it is not bound to TEA-21's 10% goal. Under the regulations, a state which. tries but does not meet its DBE goals is not penalized. See 49 C.F.R. 26.47. The regulations go further, permitting a. state to "apply for .an exemption from any provision of this part." See 49 C.F.R. § 26.15; see also Adarand VII, 228 F.3d at 1180 (finding the waiver provision persuasive evidence of flexibility).

Plaintiff claims Minnesota's decision to opt into the DBE. program rather than attempt to opt out of it, demonstrates a lack of flexibility. See P1, Reply at 7. The claim is specious. argument were to prevail, the only ultimate proof a state

could offer to show flexibility would be its efforts to reject the program entirely. This is not the law. See Adarand III, 515 U.S. at 237; 115 S. Ct. 2097 (stating that strict scrutiny does not disqualify states from. acting to respond to the effects of discrimination); Ellis v. Skinner; 961 F.2d 912, 916 (10th Cir. 1992).

e. Random Inclusion

Plaintiff complains that, "as written, 49 C.F.R. 23.62 persumes everyone in America has suffered discrimination except white males." Building upon this assertion, plaintiff argues that the economic disadvantage alternative to certification insufficiently mitigates the effect of the blanket presumption. See Pl. Mem. Summ. J. at 22. Sherbrooke extends its argument claiming that, in practice, the economic disadvantage provisions encompass more than 91% of all business owners. See id. at 23. Based upon these premises, plaintiff claims prime contractors are compelled to use race-conscious measures to comply with the DBE. program. It contends the program allows everyone except Caucasian males, regardless of any actual history of discrimination, to obtain the benefits of the DBE program.

This somewhat florid argument fails. The United States Supreme Court has expressed grave concerns about programs which afford random or blanket benefits to minority groups without connecting these benefits to a specific history of discrimination. See Croson, 488 U.S. at 506, 109 S. Ct. 706. On the other hand, as the Tenth Circuit has stated, "[w]hile the concept of classifying human beings by race is distasteful, the fact remains that discrimination occurs based on such classifications, and engaging such discrimination is a necessary evil which constitutes a compelling government interest." See Adarand VII, 228 F. 3d at 1186. It may be sad, but it is true, that Congress cannot enact a national program to remedy discrimination without going through the

painful process. of recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE program. See id. at 1186-87.

> [B]ecause of the unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based. on much broader racial classifications, extrapolating findings of discrimination against Native Americans, Asian-Pacific Americans, and Asian-Americans to include Aleuts. Samoans, and Bhutanese respectively, is more a question of. nomenclature than of narrow tailoring. The Constitution does not erect a barrier to the government' s effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.

Id. at 1185-86.

Importantly, TEA-21's DBE program attempts to avoid the potentially invidious effects of providing blanket benefits to minorities. It does so, in part, by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that. individuals -- simply on the basis of their birth -- will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

The Court finds defendants have shown a factual and logical connection between the race-conscious measures

included in TEA-21 and the ongoing effects of discrimination in the highway construction industry.

C. Plaintiff's "As Applied" Challenge

Plaintiff argues TEA-21 and MnDOT's program are invalid as applied, because they unconstitutionally deprive plaintiff of the ability to compete for subcontracts on federally funded highway projects. Plaintiff, however, fails to offer sufficient facts to support this claim.

Plaintiff does offer the possibility that it lost out on the Stearns and Ottertail subcontracts because of its Caucasian male ownership. But it fails to show that inability to secure these subcontracts is related to TEA-21`s or MnDot's DBE program. The bid differences in the Stearns and Ottertail subcontracts were marginal at best, as each of the bidding subcontractors included slightly different work in its proposal. In both cases, the successful competitor was a DBE entity, but there is no showing the company was selected for that reason. As such, there is only a conjectural showing that TEA-21 and Minnesota's DBE program caused an unconstitutional burden in either situation.

The proffered deposition testimony demonstrates that the existence of the DBE program. neither discouraged plaintiff from submitting project bids, nor resulted in any probable loss of contracts because of the owner's race. While plaintiff submits approximately 200 bids each year, plaintiff identified only two contracts where the DBE program possibly affected the ultimate selection of a subcontractor. In other words, the application of the DBE program did not limit plaintiff's ability to compete for landscaping sub-contracts. The Court finds there is insufficient evidence demonstrating a triable issue as to whether the programs are invalid as applied.

D. Minnesota's Independent Burden

Plaintiff claims MnDOT must independently demonstrate how its program. comports with Croson's strict scrutiny standard. Plaintiff is mistaken. The Constitution calls out far different requirements when a state implements a federal of firmative action program, as opposed to those occasions when .a state or locality initiates the program. See Milwaukee County Pavers Assoc. v. Fiedler, 922 F. 2d 419, 423 (7th Cir. 1991); see also Ellis, 961 F.2d at 916 (10th Cir. 1992); Tennessee Asphalt Co. v. Farris, 942 F .2d 696, 975 (6th Cir. 1991)[3]

In Croson, the Supreme Court held that states and localities establishing local affirmative action programs must demonstrate a "strong basis in evidence for [the] conclusion that remedial action was necessary." See Croson, 488 U.S. at 500, 109 S. Ct. 706 (citations omitted). TEA-21 is not, however, a state or locally based program. It was enacted by a Congress which made appropriate findings, as indicated above. When Congress establishes a constitutionally valid

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[3] The Tenth Circuit, in Adarand VII, considered whether the state had an independent compelling interest. See Adarand VII, 228. F. 3d at 1174. The Court found evidence of a dramatic reduction in DBE participation in the absence of a DBE program supportive of a finding of a compelling interest See id. Here, in the State of Minnesota; defendants indicated that during 1999 -- the period when this Court enjoined MnDOT from implementing a previous DBE program -- DBE participation dropped from over 10 percent to slightly more than 2 percent. The Court notes this decline in participation only, in dicta because the Court need not determine whether this provides Minnesota with a compelling interest. As above, this is because TEA-21, being a federal program, relieves the state of any burden to independently carry the strict scrutiny burden.

nationwide program, the federal courts afford greater deference to its national policy decisions. See Turner Broad. Sys. Inc. v. Federal Communications Comm'n, 520 U.S. 1.80, 195-96, 117 S. Ct. 1174 (1997).

Sherbrooke's assertions that Minnesota bears a separate Croson burden are not well-taken when these principles are applied. States which establish DBE programs under TEA-21 and Part 26 of its regulations are implementing a congressionally required program not establishing local ones. The waiver section of the federal regulations does not alter the mandatory federal nature of the program. When MnDOT participates in a heavily regulated federal program such as this, it need not independently prove its DBE program meets the-strict. scrutiny standard. See Milwaukee County Payers Association, 922 F.2d at 423; see also id. at 424 (finding that. "insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations," even when participation in program is not required); Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 56-7 (2d Cir. 1992); Tennessee Asphalt Co. v. Farris, 942 F.2d at. 975.

III. Conclusion

The Court finds defendants are entitled to summary judgment. Having found MnDOT's program in accord with the United States Constitution, the Court declines to exercise supplemental jurisdiction over plaintiff's claim premised on the Minnesota Constitution. 28 U.S.C. 1367.

Accordingly, IT IS ORDERED that:

1. Defendants' motion for summary judgment is granted.

2. Plaintiff's motion for summary judgment is denied.

3. Plaintiff's motion for a temporary restraining order is denied.

4. Plaintiff's motion for a preliminary injunction is denied.

LET JUDGEMENT BE ENTERED ACCORDINGLY.

Dated: November 14th, 2001

s/_____
JAMES M. ROSENBAUM
United States Chief District Judge

STATES DISTRICT COURT
DISTRICT OF MINNESOTA
00-CV-1026 (JMR/RLE)

Sherbrooke Turf, Inc.	)	
	)	
v.	)	
	)	
Minnesota Department of Transportation et al.	)	ORDER

This matter is before the Court on plaintiff's motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend judgment. Based on the files, records, and proceedings herein, IT IS ORDERED that:

Plaintiff's motion to alter or amend judgment is denied.

Dated: January 4th 2002

s/_____
JAMES M. ROSENBAUM
United States Chief District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GROSS SEED COMPANY, a Nebraska corporation, Plaintiff, v. NEBRASKA DEPARTMENT OF ROADS, and JOHN L. CRAIG, in his capacity as the Director of the Nebraska Department of Roads Defendants UNITED STATES DEPARTMENT OF TRANSPORTATION; and FEDERAL HIGHWAY ADMINISTRATION, Intervenors.	MEMORANDUM OPINION

This matter came on for trial to the Court commencing June 18, 2001, and concluding on June 26, 2001. The parties submitted post-trial briefs and the matter is now ready for decision. Pending at the time of the trial was the Federal defendants' motion for summary judgment (Filing No. 85). That motion will be denied as moot.

Having considered the evidence, consisting of the testimony of eleven witnesses and 174 exhibits, the respective trial and post-trial briefs of the parties, the Court, pursuant Fed.R.Civ.P. 52, now makes the following findings of fact and conclusions of law.

BACKGROUND

Stipulated facts:

In the pretrial order (Filing No. 138), the parties agreed that the following facts may be accepted as established for the purposes of this case:

1) Plaintiff Gross Seed Company is a Nebraska corporation specializing in landscaping, which regularly bids on federally assisted highway construction contracts. Gross Seed Company bids on highway construction contracts both as a prime and subcontractor.

2) Defendant John L. Craig is Director of the Nebraska Department of Roads (NDOR).

3) John Gross, a while male, is the President of Gross Seed Company and owns 50% of its issued stock.

4) Peggy L. Gross, the wife of John Gross and a Director of Gross Seed Company, owns 50% of the issued stock in that company. Ms. Gross is also the owner of North Central Contracting, an entity certified as a Disadvantaged Business Enterprise (DBE) in Nebraska and South Dakota.

5) On June 9, 1998, the President signed into law the Transportation Equity Act for the 21St Century (TEA-21), Pub.L. 105-178, 112 Stat. 107 (1998)., the current U.S. Department of Transportation (DOT) authorization Act for federal highway and transit programs.

6) Section 1101(b) of TEA-21[1] reauthorized the Disadvantaged Business Enterprise (DBE) program that had been established in earlier DOT statutory provisions.[2]

7) DOT adopted a new regulatory program implementing the DBE provisions of TEA-21 that was published at 64 Fed.Reg. 5095, et seq., (February 2, 1999) and is codified at 49 C.F.R. Part. 26. These DBE regulations took effect on February 2, 1999.

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[1] Section 1101(b) (1) of' TEA-21 provides in part, as follows: ("Except to the extent the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under [the Act] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." Section 1101(b) also states that women and members of minority groups identified in 8(d) of the Small Business Act are presumed to be socially and economically disadvantaged for purposes of the Disadvantaged Business Enterprise (DBE) Program.

[2] See, e.g., § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub.L. No. 102-240, 105 Stat. 1914; § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132.

8) Under 49 C.F.R. Part 26, recipients of federal aid highway funds such as NDOR are required as a condition of receiving such funds to adopt a DBE program consistent with the requirements of Part 26 and to submit that program to the DOT for its review and approval.

9) A requirement of the DOT DBE program is that recipients, such as NDOR, establish an annual or overall goal for participation in DOT-assisted contracts.

10) 49 C.F.R. Part 26 provides that whenever possible, recipients of TEA-21 federal highway funds must attempt to meet their overall goals for DBE participation through race and gender-neutral means.

11) NDOR is now and at all relevant times has been a recipient to - federal-aid highway funds authorized by TEA-21.

12) NDOR conducted an analysis to establish an overall goal for DBE participation.

13) NDOR established an overall goal far Fiscal Year 2000 of 11% and stated its intent to meet approximately 21% of that goal (i.e., a total of 2.33% overall) through race- and gender-neutral methods.

14) DOT approved NDOR's methodology for establishing its overall goal for DBE participation on federally-assisted contracts and the portion to be achieved through race-

and gender-neutral means on March 20, 2000, pursuant to 49 C.F.R. 26.51(c).

15) On October 30, 2000, based on an availability study conducted by a consultant,, MGT of America, NDOR submitted to DOT a proposed overall goal of 9.95% for fiscal year 2001, with a race- and gender-conscious goal of 4.82% and a race- gender-neutral goal of 5.13% DOT currently is reviewing that proposed goal.

16) DOT has approved use of NDOR' s proposed DBE goals for fiscal year 2001, pending completion of its review of those goals.

Controverted issues

In the pretrial order, the parties agreed that the following were the issues remaining to be determined and resolved by the Court:

1) Whether the DBE program authorized by TEA-21 is narrowly tailored to satisfy a compelling government interest.

2) Whether the regulations set forth in 49 C.F.R. Part 26 are narrowly-tailored to satisfy a compelling government interest.

3) Whether the Nebraska Department of Roads' DBE Program is narrowly - tailored to satisfy a compelling government interest.

4) Whether the DBE provisions set forth in TEA-21 are an unlawful and improper exercise of

Congress' powers under the United States Constitution.

5) Whether the gender-conscious provisions of the DBE program authorized by TEA-21 are substantially related to the achievement of important governmental objectives.

6) Whether the plaintiff has standing.

D. BACKGROUND

In June of 1998, Congress enacted the Transportation Equity Act for the 21st Century (TEA-21). Pub.L. No. 105-178, 112 Stat. 107 (1998). TEA-21 provides for the participation of disadvantaged business enterprises in federally funded highway programs. Pursuant to the statute, regulations were promulgated by the United States Department of Transportation (USDOT) for its enforcement. 49 C.F.R. Part 26 (2000).

Generally, TEA-21 provides that "not less than 10 percent" of the federal funds, expended under the statute should be used for the services of socially and economically disadvantaged businesses. The statute refers to the Small Business Act to define socially and economically disadvantaged individuals to include women, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act. 15 U.S.C. § 637(d)(1) and (3) (C) and (D).

The regulations require States to implement a Disadvantaged Business Enterprise (DBE) program to obtain federal financial assistance for state highway projects. 49 C.F.R. § 26.21. The state must then submit the plan to the USDOT for approval. A state may obtain a waiver of the requirement if

the state demonstrates it can reach a level playing field for DBE's without the implementation of the program. 49 C.F.R. § 26.15. The Nebraska Department of Roads (NDOR) adopted a program pursuant to the regulations and established an overall goal for fiscal year 2001 of 9.95% DBE participation in federally assisted highway projects (See Exhibits 201, 202 and 205). Based upon a disparity study conducted by MGT of America (Exhibit 202), NDOR submitted that it could reach 5.13% by race and gender--neutral measures, and the other 4.82% by race and gender-conscious means. The USDOT approved the proposed goal. The other provisions relating to the program will be addressed in the following discussion.

The plaintiff in this case is a company which is 50% owned by a white male, John C. Gross. Mr. Gross also testified that he is the president of the company and that he controls all the general matters of the business (Tr. 1369-70). The plaintiff does not qualify as a socially and economically disadvantaged business under TEA-21, its implementing regulations, or NDOR's DBE program.

DISCUSSION

I. Standing.

The first issue to be resolved is the State defendants' contention that plaintiff does not have standing to maintain this action seeking forward-looking relief. In the second amended complaint (Filing No. 66), plaintiff states that he is seeking "a permanent injunction against enforcement and a declaration of unconstitutionality of § 1101(b) of the Transportation Equity Act for.the 21st Century, Pub.L. 105-178 (hereinafter TEA-21), 49 C.F.R. Part 26, and the Nebraska Department of Roads Disadvantaged Business Enterprises (DBE) program, which, facially and as applied,

discriminate on the basis of race and gender in the award of federal-aid highway contracts in Nebraska.

Jurisdiction is premised on 28 U.S.C. § 1331(a) and pursuant to the Declaratory Judgment Act, 28 U.S.C. H 2201-02, and pursuant to 2 8 U.S.C. 1343 (a) (3) and (4). See also 5 U.S.C. § 702 and 28 U.S.C. 1347. Venue is appropriate pursuant to 28 U.S.C. § 1391.

The State defendants argue in their brief that plaintiff has not alleged an "imminent" injury. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (*Adarand III*), the United States Supreme Court addressed the plaintiff's claim that the government program denied it equal protection of the laws, thus requiring an injunction against the enforcement of the statute. Specifically, the Supreme Court examined whether the plaintiff "made an adequate showing that some time in the relatively near future, it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Adarand III*, 515 U.S. at 211. The Supreme Court found that the plaintiff need not demonstrate that it will below bidder on the contract because the injury is the inability to compete on equal footing for contracts. *Id.*

The stipulated facts and the testimony of Mr. Gross at trial and by deposition establish that he not only has bid on federal highway work in Nebraska in the past but that he will continue to bid on the work. He stated that he bids as a subcontractor and on a limited basis as a prime contractor. This testimony is sufficient to demonstrate that the plaintiff has standing to challenge TEA-21, its implementing regulations, and the Nebraska Department of Roads program adopted pursuant to the regulations. *Adarand III, supra.*

II. Equal Protection.

While Congressional enactments are usually presumed constitutional, a statute which uses race-based classifications is presumed unconstitutional., Personnel Adm`n v. Feeney, 442 U.S. 256, 272 (1979). In *Adarand III*, the Supreme Court made clear that all classifications imposed by a government actor, based upon race, are to be analyzed under strict scrutiny. *Adarand III*, 515 U.S. at 227. To be constitutional, such classifications must be narrowly tailored to further a compelling governmental interest. *Id.* at 227. Classifications based upon gender are subject to intermediate scrutiny. The Federal Defendants acknowledge the application of intermediate scrutiny to gender-based classifications. However, they suggest that the Court need not address the gender-based portions separately, as they will meet the more rigorous standard of strict scrutiny. The Court has concluded that both meet the strict scrutiny standard and so will discuss both classifications together.

In other words, the government must show the classification serves an important governmental interest and that the discretionary means are substantially related to serve that interest. United States v. Virginia, 518 U.S. 515, 533 (1996); In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026,1033 (D . Minn. 1998).

A. Racial and Gender Classification - Strict Scrutiny

1. Compelling - Interest

The compelling interest prong of strict scrutiny has three parts. First, a court must determine whether the government has articulated a goal that is a "compelling interest" under the governing law. Next, the court must determine if actual evidence supports the goal. Finally, the court examines whether the challenger has rebutted the evidence submitted by the government.

Turning to the first prong, Congress stated that the DBE program of TEA-21 was necessary to remedy discrimination in. the construction industry. H. Rep. 105-550. The United States Supreme Court has previously recognized that the government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of funds and in remediating the effects of past discrimination. *City of Richmond v. Croson*, 488 U.S. 469, 491-92 (1989). Thus, the Court must determine whether actual evidence supports a finding of the existence of past discrimination.

The government also has a significant interest in remedying the effects of past discrimination based upon gender. *See United States v. Virginia,* 518 U.S. 515, 531 (1996) (stating that the Court has long recognized the history of sex discrimination in this country). *See also California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (holding that the government has an important governmental interest in promoting equal employment opportunities for women).

Ultimately, the Court must determine whether there is a strong basis in evidence for the conclusion that remedial action was necessary. *Concrete Works of Colorado, Inc. v. Denver,* 36 F.3d 1513, 1520 (1994). However, like the parties in Concrete Works, the parties in this case disagree as to what evidence the Court should examine to determine if there is a strong basis. See Concrete Works, 36 F.3d at 1520. In examining whether evidence supports a finding of discrimination to, in turn, support a compelling interest, the court may look at both statistical and anecdotal evidence. Id. at 1530. In addition, the Court should consider both direct and circumstantial evidence, including pre-enactment and post-enactment evidence. *Id.* Finally, public and private discrimination in both specific areas of government contracts and the construction industry generally, are relevant. Id.

Plaintiff suggests that even though Congress has studied and legislated on the need for this type of remedial legislation for many years, it is still necessary that the present record made by Congress to support TEA-21 must include the prior studies and debates conducted by and before Congress. The Supreme Court had recognized in *Fullilove v. Klutznick*, 448 U.S. 448, 503, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) that "[a]fter Congress has legislated repeatedly in an area . . . that may reduce the need for fresh hearings and long debates. . . . . "See also *Gwenn Okruhlick v. University of Arkansas*, 255 F.3d 615, 625 (8th Cir. 2001). That is the case here. Based on the evidence presented and considering the history of this legislation, the Court finds that the federal government's evidence is sufficient to demonstrate past discrimination does exist in the construction industry. Furthermore, the Court finds that racial and gender discrimination within the construction industry is sufficient to demonstrate a compelling interest in individual areas, such as highway construction.

2. Narrowly Tailored

Next, the Court turns to the second prong of the strict scrutiny analysis -- narrow tailoring. *In United States v. Paradise*, 480 U.S. 149, 171 (1987), the United States Supreme Court articulated several factors to determine whether a race-conscious remedy is appropriate: "the necessity for relief and efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." \

a. Necessity for Relief and Efficacy of Alternative Remedies

This factor requires the Court to determine if there has been inquiry into. the use of race-neutral means to increase minority business participation. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-38 (1995). At trial, the Federal Defendants presented evidence that Congress, through extensive research and hearings, determined that race-neutral measures alone would not entirely remedy the-problem of past discrimination. In implementing this legislation, the Department of Transportation has adopted rules governing participation by disadvantaged business enterprises in the Department's programs. See 49 C.F.R. Part 26. Section 26.51 which deals specifically with race neutral and race conscious means provides that participating states must meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating DBE participation. Race conscious means must be-used to meet that portion of the State's goal not achieved through the use of race-neutral means. The evidence sufficiently demonstrates the necessity of the program as designed.

b. Flexibility and Duration of Relief

Flexibility largely depends upon the availability of waiver out of the discriminatory requirements, which is a part of TEA-21. 49 C.F.R. § 26.15. Plaintiff agrees with defendants that the federal program is flexible. A program must also have a limited duration.

A program which employs discriminatory practices must not last longer than necessary to eliminate the discrimination. Adarand, 515 U.S. at 273-38. TEA-21 and its implementing regulations expire in 2004, unless Congress reauthorizes the program. Prior to reauthorization, Congress must reevaluate to determine if the program is still necessary. Furthermore, internally, the federal program has salary caps. In other words, when an individual's net worth is over $750,000, the individual's company is no longer qualified as a

DBE. For these reasons, the Court finds that this factor is met in this ease.

c. Relationship of numerical goals to the relevant labor market

In *Croson v. City of Richmond,* the United States Supreme Court struck down a quota that "rest[ed] upon the `completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson v. City of Richmond,* 488 U.S. 469, 507 (1989). The Federal Defendants point to the necessity that a state set annual overall goals that reflect market conditions that would be achieved if discrimination was lacking.

An examination of the enabling statute and the regulations adopted by the United States Department of Transportation provide a reasonable means to address the discrimination which congressional studies have found exist in the construction industry.

d. Impact of relief on Third Parties

Innocent persons may bear some burden of remedial measures to eradicate past discrimination. *Fullilove*, 448 U.S. at 484. However, the limit on this burden is found in the "good faith" provisions for contractors when contract goals are set. 49 C.F.R. 26.53.

Having examined the legislative history and the regulations adopted by the Department of Transportation, the Court is satisfied that the evidence establishes a compelling interest for the adoption of TEA-21 and Part 26 of the Code of Regulations, 49 C.F.R. Part 26.

C. NDOR Program

The evidence clearly establishes that NDOR's DBE program (Exhibits 201, 202 and 205) was adopted to comply with 49 C.F.R. Part 26. The plaintiff suggests that the State independently establish that a compelling interest exists in Nebraska and that its program is narrowly tailored to meet that compelling interest. In *Sherbrooke Turf, In.c. v. Minnesota Dept. of Transportation, supra*, Judge Rosenbaum articulately rejects this contention, citing *Milwaukee County Pavers Assoc. v. Fiedler*, 922 F.2d 429, 423 (7th Cir. 1991) ; see also Ellis, 961 F.2d at 916 (l0th Cir. 1992); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 696, 975 (6th Cir. 1991). When a state participates in a heavily regulated federal program, such as the DBF program, it is not necessary that it independently prove that its program meets the strict scrutiny standard. In *Milwaukee County Pavers Assoc., supra*, at 424, the Court stated:

> Insofar as the State is merely doing what the statute and regulations envision and permit, the attack on the state is an impermissible collateral attack on the statute and its regulations.

For these reasons, the Court concludes that the State need not independently establish that its program meets strict scrutiny, and its program will be approved as the Court has found that TEA21 and 49 C.F.R. Part 26 meet the requirements of strict scrutiny and are, therefore, constitutional. A separate judgment will be entered in accordance with this memorandum opinion.

DATED this 6th day of May, 2002.

BY THE COURT:

s/_____
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GROSS SEED COMPANY, a Nebraska corporation, Plaintiff, v. NEBRASKA DEPARTMENT OF ROADS, and JOHN L. CRAIG, in his capacity as the Director of the Nebraska Department of Roads Defendants, UNITED STATES DEPARTMENT OF TRANSPORTATION; and FEDERAL HIGHWAY ADMINISTRATION, Intervenors.	)	4:OOCV3073 ORDER AND JUDGMENT

Pursuant to the memorandum opinion entered-herein this date,

IT IS ORDERED:

1) Federal defendants' mot ion for summary judgment (Filing No: 85) is denied as moot.
2) Plaintiff's second amended complaint (Filing No. 66) is dismissed.
3)

DATED this 6th day of May, 2002.

BY THE COURT:

s/_____
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GROSS SEED COMPANY , a Nebraska corporation Plaintiff,	)	4:00CV3073
NEBRASKA DEPARTMENT OF ROADS, and JOHN L. CRAIG, In his capacity as the Director of the Nebraska Department of Roads Defendants,	)	ORDER
UNITED STATES DEPARTMENT OF FEDERAL HIGHWAY ADMINISTRATION, Intervenors.	)	

This matter is before the Court on plaintiff's motion to amend findings or, in. the alternative, for new trial and request for oral argument (Filing No, 241). The Court has reviewed the transcript of the trial, plaintiff's motion, and all briefs in support of and in opposition to said motion, and finds it should be denied. Accordingly,

IT IS ORDERED that plaintiff's motion to amend findings or, in the alternative, for new trial and request for oral argument is denied.

DATED this 9th day of July, 2002.

BY THE COURT:

s/_____

LYLE E. STROM, Senior Judge
United States District Court

* * *

you are aware of that you-believe qualifies as evidence of discrimination within the construction, highway construction industry, everything that you are aware of.

A That's an incomplete sentence. What's the 6 question?

Q My question is, and I am going to follow up here, what I want you to answer is what you know of or what you believe exists in the way of evidence of discrimination within the road construction industry.

A I don't have any global answer to that

Q Do you know of any?

A Again, in my work, which was focused on drafting the rulemaking, I worked from the public record of the debate on TEA-21, and that's the information I had before me.

Q Anything else?

A I didn't refer to anything else.

Q While you might not have referred to anything else, does that represent the world of

* * *

Q In other words, I think what I hear you saying is the DBE program was promulgated without regard to determining what discrimination it was being put in place to remedy; is that correct?

MS. BURROWS: Objection, that mischaracterizes his testimony.

BY MR. OLSON:

Q And if I have mischaracterized it, you can - -

A I wouldn't agree with that characterization.

Q. Did you ever determine as part of the work that you did in developing the program what discrimination it would be remedying?

A Well, again, my purpose in my corner of the DBE program drafting the regulations was to implement what Congress determined we should do in, you know, as reasonable a way as we could. And so I wasn't in the determination making business; I was in implementing the statute business.

Q In other words, as part of your implementation of the statute you did not have occasion to examine what discrimination the regulation being promulgated to remedy, if any?

A I made no such independent examination.

Q You spoke a moment ago about, as I understand you to have said, that your work in promulgating or developing the regulation per the statute was to try and develop a means by which a level playing field could be obtained; is that correct?

A Yes.

Q And would you describe that as developing a regulation that would allow for an equal opportunity of all subs, suppliers, general contractors on construction projects to submit the low bid?

A I -- again, I don't think I would characterize it in that way.

Q How would you characterize it?

A As an attempt to ensure that DBEs, you know, played on a level field in competing for contracts involving DOT funding.

Q And what I want you to do is to define what you mean by level playing field. In other words, and if my understanding is incorrect, please determine it

* * *

* * *

if the goal has been met through his use of subcontractors identified; second, if he did not meet the goal in that contract, did the contractor demonstrate good faith efforts to meet the goal. And failing both of those criteria, there may be a circumstance where we would require a contractor to utilize a higher bidding DBE for lack of his good faith efforts, if the price differential is not excessive or unreasonable. I just remembered a caveat to the last part. And there is also a consideration that we make if it does not make good business sense for the prime contractor to utilize a higher bidding DBE, our office makes a determination that he has met his good faith efforts despite not meeting the goal.

Q. If you look at the last sentence of Paragraph 5, Page 4, Exhibit 1, you agree with me the apparent successful bidder is not however required to accept higher quotes from DBEs if the price difference is excessive or unreasonable. Is that a correct statement?

A. That's correct.

Q. Let's get back to something you said. I just want you to clarify it for me. What you said is there are certain circumstances under which the apparent successful bidder would be required to accept a higher quote from the DBE if the price difference was not excessive and in fact was reasonable; is that correct?

A. That is correct.

Q. Great. What I want to do is follow-up on that. I want to flush out more of what those circumstances are under which a prime in fact using good business judgment -- as to the language that you've referred to -- in fact it's at the first

part of that paragraph. When evaluating whether or not to use a higher DBE bid during the pre-letting stage, under what circumstances must a prime contractor determine whether or not to use a higher DBE bid? In other words, let me follow-up. Would it be a correct statement to say that let's go through some scenarios. Strike that. I'm going to go through a number of statements and maybe this will help clarify or say yes or no to. in order to satisfy MnDOT's DBE program requirements as written, does a prime contractor always have to use a DBE higher bid provided that it is not unreasonably or excessively higher?

A. No.

Q. It makes sense to me. So there are only

* * *

A To answer the first part, we do not have a set prescribed definition for that term, excessive or unreasonable. And the answer to the second part would rest on the factors that we previously discussed in that the prime -- the prime contractor in question would be responsible for discussing the issues with our office in a joint effort to determine whether or not this is an excessive or unreasonable difference in prices.

Q. Okay. Well, I'm the prime contractor and I come into your office before the bid letting and I present to you my traffic control bid is ten percent higher.

A. Before the bid letting we wouldn't talk to you.

Q. Got you. All right. Let me switch subjects a moment. Do you agree that if sub and supply contracts are awarded on the basis of low price without regard to the race or gender of their owners that ensures that there is no discrimination in the award of road construction contracts?

A. Would I believe?

Q. Yes.

A. It's my belief, yes.

* * *

contracts?

A. Anything that we did have was provided in discovery, but I know of -- personally know of no situations of a discriminatory nature that was reported.

Q. Be it.by a sub, supplier, or general contractor; is that correct?

A. That's correct.

Q. And would it be similarly true that you know of no highway construction contracts where Mn/DOT has discriminated against DBEs in the award of prime contracts?

A. That is correct.

Q. I take it consistent with the question you gave a moment ago, you know of no highway construction contracts where prime contractors were alleged to have discriminated against DBE's; is that correct?

A. That is correct.

Q. Do you have any knowledge, Sir -- I take it you don't -- as to any situation where anyone alleged discrimination against DBEs by either sureties, labor unions, or lenders?

A. No.

Q. No you don't know of any such

* * *

MR. ADELSTEIN: Certainly.

THE WITNESS: I don't know.

BY MR. OLSON:

Q. In other words, would it be a fair statement to say, Sir, based upon your work with the DBE program., your access to the documents that we've discussed, you're not aware of any discrimination that's occurred in Minnesota which Minnesota DBE's program has been set up to remedy. Is that a correct statement?

A. That is a correct statement I personally do not know.

MR. OLSON: Do you want to take a break?

MR. ADELSTEIN: Sure.
(Whereupon, a brief recess was taken.)

BY MR: OLSON:

Q. Do you have a resume?

A. Do I have a resume?

Q. Yes.

A. It's not current any more. It doesn't reflect my employment here.

Q. Is it current up to the date of your current employment?

* * *

A. Yes, it would.

Q. Am I correct you're not aware of an instance where a DBE was denied a contract despite submitting the low bid; is that correct?

A. If you're referring to the previous case in which Sherbrooke Turf sued the DBE -- sued the DBE program.

Q. I should have asked the question more clearly, I apologize. Are you aware of any instance where a DBE was denied work on a Mn/DOT project despite the fact: that it submitted the low bid to the prime contractor?

A. Not to my knowledge.

Q. Are you aware of any instances of bid shopping? Are you familiar with that term?

A. I've heard the term referred to several times. I'm not thoroughly familiar with what it means. So with regard to that, I couldn't answer with a full base knowledge.

Q. Are you familiar with any instance where a prime contractor received a DBE bid and then contacted another non-DBE competitor at which time the prime told the non-DBE competitors about the dollar, value of the DBE bid and gave them an opportunity to either match or beat that bid?

* * *

* * *

without goals, Mn/DOT has identified a pattern of exclusion of DBEs in Mn/DOT highway contracting. Mn/DOT has determined the extent of the disparity supports a conclusion that the exclusion of DBEs must be deliberate.

REQUEST NO. 2.

Minnesota cannot identify any MnDOT highway contract awarded in the last six years in which Minnesota discriminated against Minnesota DBEs.

RESPONSE:

Mn/DOT objects Request No. 2 'as vague and ambiguous as to its use of the term "Minnesota' and "discriminated against." Subject to this and its General Objections, MnIDOT denies the statement in Request No. 2. Based on the statistical findings and anecdotal evidence found in the MTA study, Mn/DOT can identify a period of time in the absence of its DBE Program where in the award of highway contracts it passively participated in the discrimination against business enterprises that would eventually be certified as DBEs.

REQUEST NO. 3.

Minnesota cannot identify any MnDOT contracting personnel who have, in the last six years, discriminated against Minnesota DBEs.

RESPONSE:

Subject to its General Objections, MnDOT admits the statement in Request No. 3.

REQUEST NO. 4.

MnDOT has taken no disciplinary action against any employee for discriminating against a DBE in the last six years.

RESPONSE:

Subject to its General Objections, Mn/DOT admits the statement in Request No. 4.

REQUEST NO. 5.

MnDOT can identify no instance of discrimination against any DBE in the award of any subcontract on a MnDot prime contract in the last six years.

RESPONSE:

Subject to its General Objections, Mn/DOT denies the statement in Request No. 5 because anecdotal evidence and the disparity between utilization of DBEs in contracts with goals and those without goals, Mn/DOT has identified a pattern of exclusion of DBEs in Mn/DOT highway contracting. Instances of discrimination would include those during the relevant time period where no DBE program existed.

REQUEST NO. 6.

Minnesota has not taken any action punishing any non-DBE for discrimination against a DBE in connection with any highway contract in the last six years.

RESPONSE:

Subject to its General Objections, Mn/DOT admits the statement in Request No. 6 to the extent that the term "Minnesota" refers to Mn/DOT. To the extent that the term

"Minnesota" refers to the other agencies, Defendants are unable to admit or deny the statement in Request No. 6.

REQUEST NO. 7.

Minnesota has not had any written complaints of discrimination against Minnesota DBEs regarding the award of MnDOT prime contracts in the last six years.

RESPONSE:

Subject to its General Objections, Mn/DOT admits the statement in Request No. 7.

REQUEST NO. 8.

MnDOT cannot identify any discrimination against a DBE in the last six years by a lending company, surety company or supplier.

RESPONSE:

Subject to its General Objections, Mn/DOT admits the statement in Request No. 8.

REQUEST NO. 9.

DOT does not know the names of the persons supplying anecdotes and/or has never seen the original interview records of the persons supplying the anecdotes in the MTA study prepared for MnDOT.

RESPONSE:

Subject to its General Objections, Mn/D0T admits the statement in Request No. 9.

REQUEST NO. 10.

MnDOT does not know whether the alleged incidents reported in the MTA anecdotal section actually occurred.

RESPONSE:

Subject to its General Objections, Mn/DOT admits the statement in Request No 10.

REQUEST NO. 11.

MnDOT has never seen the entire list of DBE and non-DBE firms MTA regarded as available in its study.

RESPONSE:

Subject to its General Objections, Mn/DOT admits the statement in Request No. 11.

REQUEST NO. 12.

For the purposes of meeting MnDOT DBE goals, a firm, must have DBE certification.

RESPONSE:

Subject to its General Objections, Mn/DOT admits the statement in Request No. 12.

REQUEST NO. 13.
In order to bid on a MnDOT prime contract a Firm must be pre-qualified by MnDOT.

* * *

United States General Accounting Office

GAO

Report to Congressional Committees

June 2001

DISADVANTAGED BUSINESS ENTERPRISES

Critical Information Is Needed to Understand Program Impact

(Selected Pages)

* * *

transit authorities to use the best available data in DBE goal setting, and the status of DBE and non-DBE participation data.

USDOT established a minority and women's business enterprise program for its highway, airport, and transit programs by regulation in 1980. The Surface Transportation Assistance Act of 1982 contained the first statutory DBE provision for federal highway and transit programs, requiring that a minimum of 10 percent of the funds provided by the act be expended with small businesses owned and controlled by socially and economically disadvantaged individuals, unless the Secretary of Transportation determined otherwise. Nonminonty women were not included as socially and economically disadvantaged individuals. The Surface Transportation and Uniform Relocation Assistance Act of 1987 continued the program and included nonminority women in the statutory definition of socially and economically disadvantaged individuals,. thereby allowing states to use contracts with both minority and women-owned businesses to meet their DBE goals. The Intermodal Surface Transportation Efficiency Act of 1991 and TEA-21 (1998) reauthorized the program, continuing the combined 10percent provision for participation by minority-owned and nonminority women-owned DBEs. The percentage of federal funds expended through USDOT assisted highway and transit contracts with DBEs increased from 9.9 percent in 1983 to 12.8 percent in 1999.

TEA-21 and USDOT's regulations establish the basic eligibility requirements for participation in the DBE program. The program is limited to small businesses owned and controlled by socially and economically disadvantaged individuals. Women and members of certain minority populations, such as African-, Hispanic-, and Native-

Americans and other minorities found to be disadvantaged by the Small Business Administration (SBA), are presumed to be socially and economically disadvantaged unless proved otherwise[4]. These individuals must own at least 51 percent of thefirm and actually control its operations. To qualify as a small business, a firm must have average annual gross receipts over a 3-year period that do not exceed either (1) the applicable SBA small business size standards[5] or (2) a USDOT specific cap ($17.4 Million).[6] There is no legislative or administrative requirement limiting the length of time firms can participate in the program. However, DBEs become ineligible, or "graduate, when their average annual gross receipts over a 3-year period exceed the applicable SBA small business size standards or the USDOT specific cap. According to our survey results, most of the states and transit authorities did not have any DBEs graduate in 2000. In

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[4] Firms owned and controlled by those who are not presumed to be socially and economically disadvantaged may qualify for the program if the owner can demonstrate disadvantage. However, no individual whose personal net worth exceeds $750,000 may be considered economically disadvantaged. This amount does not include the individual's interest in the business or equity in a primary residence.

[5] SBA's size standards define the maximum size at which a firm can be considered a small business. The size standards are usually defined by the number of employees or the average annual receipts.

[6] TEA 21 established a cap of $16.6 million, but authorized the Secretary of Transportation to adjust this amount for inflation. In August 2060, USDOT raised this cap from $16.6 million to $17.4 million. Since the change was effective only for the last 2 months of fiscal year 2000, we used the $16.6 million figure when we asked in our questionnaire for fiscal year 2000 data on annual gross receipts.

addition,. about one-quarter of the states- and transit authorities we surveyed could not provide this information. States and transit authorities are not required to track this information, and graduation is not a goal of the DBE program. Moreover, as we reported in 1994,[7] because average annual gross receipts do not reliably indicate DBEs' success, graduation is not a useful measure of the success of the program as a whole.

USDOT administers the DBE program through the Office of the Secretary and the Department's operating administrations, including the Federal Transit Administration OM) and the Federal Highway Adminstration (FHWA). USDOT develops program policies, instructions, and procedures; reviews and approves states' and transit authorities' DBE program plans; and provides technical assistance among other things. States and transit authorities must certify that program applicants meet the eligibility criteria, reassess annually the eligibility of certified businesses, and establish overall annual goals for the participation of DBEs in their USDOT assisted contracts. DBE participation goals are expressed as a percentage of all federal highway and transit funds expended on USDOT assisted contracts in a fiscal year.

One of the sources states and transit authorities may use to help set their overall federal DBE participation goals is data derived from disparity studies, which measure the availability of minority- and women-owned businesses compared with their utilization in contracting. States and transit authorities also use disparity studies to support state and local minority business contracting programs. The significance of disparity studies as evidence of discrimination in this context was discussed in a 1989 Supreme

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[7] Highway Contracting: Disadvantaged Business Program Meets Contract Goal, but Refinements Are Needed (GAO/RCED-94-168, Aug. 17,1994).

Court decision.[8] In *City of. Richmond v. J.A. Croson Co.*[9], the Court held that state and local programs that use race or ethnicity as a factor in apportioning public contracting opportunities are subject to strict scrutiny.[10] This means that the programs must serve a compelling governmental interest and be narrowly tailored-that is, designed to be no broader than necessary-to meet that interest.

The Court found that combating racial discrimination is a compelling interest. However, it held that the city had not presented sufficient evidence of discrimination to justify its minority contracting plan. In evaluating the city's evidence, the Court found, among other things, that the city had inappropriately relied on the disparity between the number of

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[8] This decision does not address state and local implementation of the federal DBE program. Furthermore, several members of the Court stated that, unlike state and local governments, the Congress legislates on a nationwide basis and has inherently broader powers to remedy discrimination. Therefore, the Congress may deserve greater deference than state and local governments. Also, we note disparity studies are not required to support their participation in the federal program.

[9] 488 U.S. 469 (1989).

[10] The purpose of strict scrutiny is to ensure that the goal of the program is important enough to warrant treating people differently on the basis of their race or ethnicity and that the means chosen to achieve the goal fit it so closely that there is little or no possibility that an illegitimate prejudice or stereotype is the motive for such different treatment Programs. that use gender as a factor in decision making are subject to a more lenient standard than those involving race or ethnicity. These programs must be substantially related to the achievement of an important governmental interest.

prime contracts awarded to minority firms and the minority population of Richmond. It stated that an appropriate disparity evaluation would compare the percentage of qualified minority contractors with the percentage of dollars actually awarded to minority businesses.[11] While courts have favorably cited disparity studies in some cases,[12] many courts have rejected the studies' findings, often because of methodological weaknesses, when considering whether a compelling interest exists for state or local minority contracting programs.[13] These decisions provide varying

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[11] Several members of the Court emphasized that an inference of discrimination could arise from a significant statistical disparity between the number of qualified, willing, and able minority contractors and the number actually engaged to perform a particular service.

[12] See, e.g., *Cone Corp. v. Hillsborough County*, 908 F2d 908 (11th Cir 1990), cert. denied,. 498 U.S. 983 (1990) and *Concrete General, Inc. v Washington Suburban Sanitary Comm'n*, 779 F Supp. 370 (D. Md. 1991)(both finding that statistical analyses presented in connection with motions for summary judgment did not suffer from the defects identified by the Supreme Court in *Croson*).

[13] *See, e.g. W.H. Scott Construction Co., Inc. v. City of Jackson*, 199 F.3d 206 (5th Or. 1999)(study did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool for the city's program); *Engineering Contract an Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F3d 895 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998)(marketplace study included the number of licensed construction contractors rather than the number of firms willing, able, or qualified to perform work on county construction contracts and data on certain minority and women contractors did not contain any statistically significant

degrees of guidance on the data and methodology that need to be used in disparity studies to produce reliable evidence of discrimination.

A 1995 Supreme Court decision had a significant impact on the federal DBE program, as well as other federal programs that use race or ethnicity as factors in decision-making. *Adarand Constructors, Inc. v. Pena*[14] involved FHWA's use of a subcontracting compensation clause in direct federal contracting to implement the DBE provision and provisions of the Small Business Act.[15] Adarand Constructors, a nondisadvantaged contractor, initiated the on in 1990- after it was denied a subcontract on a federal lands highway project. In 1992, the district court held that the programs at issue were constitutional, and in 1994 the Tenth Circuit Court of Appeals

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unfavorable disparities after accounting for firm size); *Concrete Works of Colorado, Inc. v City and County of Denver*, 86 F Supp. 2d 1042 (D. Col. 2000)(studies assumed that all existing firms were available to perform within applicable time constraints and aggregated available minority firms regardless of their size or the services they performed); *Phillips & Jordan, Inc. v Watts*, 13 F Supp. 2d 1308 (N.D. Fla. 1998)(study assumed that every firm included in selected standard industrial codes was qualified, willing, and able to bid on road maintenance contracts and calculated availability and utilization rates on a statewide basis, even though contracts were let on the district level).

[14] 4515 U.S. 200 (1995).

[15] The subcontracting compensation clause provided prime contractors additional compensation for hiring subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals.

affirmed that decision.[16] In 1995, the Supreme Court set aside the Court of Appeals' decision and sent the case back to the lower courts, directing them to apply the strict scrutiny standard and thus determine whether the programs were narrowly tailored to further a compelling governmental interest. Applying this standard, the district court held that the subcontracting compensation clause and related statutory provisions were unconstitutional in 1997.[17] This decision was the subject of considerable discussion during the congressional debate over the reauthorization of the DBE program as part of TEA 21, which was enacted in 1998.[18]

Responding largely to the Supreme Court's 1995 decision and congressional debate over the DBE program, USDOT issued regulations in 1999 to ensure that the DBE program is narrowly tailored. In addition, the regulations are designed to ensure nondiscrimination in the award acid administration of

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[16] *Adarand Constructors, Inc v. Pena*,16 Fad 1537 (10th Cir.1994); *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992).

[17] *Adarand Constructors, Inc. v. Pena*, 965 F Supp.1556 (D. Colo. 1997). On appeal, the Tenth Circuit Court of Appeals found that the case was moot since Adarand Constructors had been certified as a DBE after the district court's decision. *Adarand Constructors, Inc. v. Slater*,169 Fad 1292 (10th Cir. 1999). However, the Supreme Court held that the case was not moot and directed the Tenth Circuit Court of Appeals to consider the district court's 1997 decision. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000).

[18] USDOT believes that the Congress established a compelling govemmental interest in the DBE program through the body of evidence that supporters of the program presented during the congressional debate over the program and the subsequent reauthorization of the DBE provision in TEA-21.

USDOT assisted contracts, remove barriers to the participation of DBEs in such contracts, and provide appropriate flexibility to the recipients federal funds in establishing and providing opportunities to DBEs, among other things. In September 2000, the Tenth Circuit Court of Appeals upheld the constitutionality of the current DBE program because it found that the program served a compelling governmental interest and was narrowly tailored, largely because of structural changes in the program resulting from USDOT's new regulations.[19] Adarand Constructors requested that the Supreme Court review the Court of Appeals' decision in November 2000. In March 2001, the Supreme Court agreed to hear the case.[20]

USDOT'S New Regulations Significantly Changed The DBE Program

USDOT's 1999 DBE regulations made significant changes to the DBE program. For example, the new regulations overhauled the program's goal-setting process, including the use of race-neutral measures (e.g., technical assistance) and revised its eligibility requirements. In addition, the new regulations required that states and transit authorities develop

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[19] Adarand Constructors, Inc. v. Slater 228 F3d 1147 10th Cir. 2000). By the time of the Tenth Circuit Court of Appeals' decision, FHWA had discontinued its use of the subcontracting compensation clause.

[20] *Adamnd Constructors, Inc. v. Mineta*,121 S. Ct:1401, *amended by* 69 U.S.L.W 3670 (U.S. Apr. 13, 2001) (No. 00-730). The Supreme Court will address the following two questions: (1) Did the court of appeals misapply the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination? and (2) Is USDOT's current DBE program narrowly tailored to serve a compelling government interest?

bidders lists and unified certification programs, among other things, to make more streamlined and efficient. However, 72 percent of the states and transit authorities responding to our survey indicated that the new regulations have made it more difficult for them to administer the program. In addition, over half of the states and transit authorities indicated that the new regulations have made it more difficult for DBEs to apply to the program.

New Goal-Setting Process Shifts Focus of Program

The new goal-setting process shifted the focus of the program from achieving the maximum feasible extent of DBE participation in USDOT assisted contracting to achieving a level playing field"-that is, the amount of participation DBEs would be expected to achieve in the absence of discrimination. For example, under the prior regulations, states and transit authorities were required to justify goals lower than 10 percent-the amount identified in the statutory DBE provision The regulations established a direct link between the amount of participation identified in the statute and the goals set by states and transit authorities. In contrast, the new regulations require states and transit authorities to base their DBE participation goals on demonstrable evidence of the number of "ready, willing, and able DBEs ale in local markets relative to the number of all businesses "ready, willing, and able- to participate in USDOT assisted contracts in such markets--representing the level of DBE participation expected in the absence of discrimination.[21]

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[21] According to the new regulations, the 10-percent goal established in TEA-21 is an aspirational goal at the national level that USDOT will use as a means of evaluating the overall performance of the DBE program nationwide; however, it is not tied to individual states and transit authorities and does not require that states and transit authorities set a 10-percent goal.

The regulations outline a two-step process for goal-setting. First, states and transit authorities must establish a base figure that represents the "ready, willing, and able" DBEs in the state or transit authority's market relative to all "ready, willing, and able" firms in that market (i.e., relative availability of DBEs). To determine the relative availability of DBEs, the new regulations require that states and transit authorities use the best available data and suggest that states and transit authorities use DBE directories and Census Bureau data, bidders lists, disparity studies, or the goal of another recipient. Second, states and transit authorities must adjust their base figure to account for other factors affecting DBEs, such as the capacity of DBEs to perform work in USDOT assisted contracts and findings from disparity studies. According to our survey results, the most common sources used to set states' and transit authorities' fiscal year 2000 participation goals were DBE directories, historical utilization patterns, Census Bureau data, and bidders lists. Under the new goal-setting process, the average DBE participation goal decreased from 14.6 percent in fiscal year 1999 to 13.5 percent in fiscal year 2000.

The new regulations also require that states and transit authorities meet the maximum feasible portion of their overall DBE goals using race-neutral measures rather than race-conscious measures. The prior regulations did not require the use of race-neutral measures (e.g., outreach and technical assistance), which are designed to increase contracting opportunities for all small businesses, and do not involve setting specific goals for the use of DBEs on individual contracts. A race-conscious measure is one that is focused solely on assisting DBEs. An example of a race-conscious measure is a contract goal-that is, a DBE participation goal set for a specific contract or project. While quotas are prohibited and set asides are allowed only in the most extreme cases of discrimination, states and transit authorities must use

contract goals to meet any portion of their overall goals they do not expect to meet using race-neutral measures.[22] State and transit authorities must submit their overall DBE participation goals, including the methodology used to set the goals and the projected use of race-neutral and race-conscious measures, to USDOT for approval on an annual basis. The states and transit authorities we surveyed indicated that, on average, they used race-neutral measures to achieve slightly over one-third of their overall DBE participation goals in fiscal year 2000.

New Eligibility Requirement Focuses on Owners' Personal wealth

The new regulations established a personal net worth cap for individuals whose ownership and control of a business determines DBE eligibility. According to USDOT, this new eligibility requirement is designed to ensure that the program is limited to firms owned and controlled by genuinely disadvantaged individuals. Prior to the new regulations, the absence of a limit on personal net worth led to criticism that wealthy individuals could benefit from the program. Under the new regulations, to qualify as economically disadvantaged, individuals who own and control DBEs must have a personal net worth that does not exceed $750,000. USDOT chose the $750,000 cap because it is a well-established standard for the SBA's programs. According to our survey results, the number of firms that. exceeded this limit and became ineligible for the DBE program in fiscal year 2000 ranged from 0 in 14 states and transit authorities to 39 in 1 state. Twenty-two percent of the states and transit

[22] To the extant that race-conscious measures are no longer needed to achieve overall goals, states and transit authorities must discontinue their use.

authorities we surveyed reported that this information was not available.

New Regulations Include Other Requirements to Improve the DBE Program

The new regulations include other changes designed to improve the effectiveness and efficiency of the DBE program. For example states and transit authorities are now required to create and maintain a bidders list, which is a record of all firms that bid on rime and subcontracts for USDOT assisted projects. The list must include each firm's name, its as a DBE or non-DBE, its years in operation, and its annual gross receipts.[23] The list is intended to count all firms that are participating, or attempting to participate in USDOT- assisted contracts; however the regulations do not specify how often the bidders list must be updated, for example, to ensure that firms no longer available are removed from the list. USDOT believes that the bidders list is a promising tool for states and transit authorities to accurately measure the relative availability of "ready, willing, and able" DBEs when setting

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[23] USDOT issued an interim final rule in November 2000; specifying that states and transit authorities could collect annual gross receipts information from firms in ranges rather than exact figures.

their DBE goals. Sixty percent of the states and transit authorities we surveyed reported that they are in the process of developing or implementing their bidders lists while 27 percent indicted that their lists are fully implemented. Eight percent of the states and transit authorities reported that they had not yet started developing their bidders lists. The remaining 5 percent of the states and transit authorities reported that their bidders lists were in some other stage of development.

Another change designed to improve the efficiency of the DBE program is the requirement that states and transit authorities develop and participate in a unified certification program (UCP). A UCP provides "one-stop shopping for DBEs because it makes all DBE certification decisions within a state. All recipients within a state must honor the certification decisions of the UCP. Prior to the new regulations, DBEs often had to obtain separate certifications from multiple recipients within one state. For example, in California there were about 60 certifying agencies throughout the state. Under the new regulations, DBEs will have to be certified by only one agency to participate in the DBE programs administered by all recipients in that state. By March 2002, the state DOT and all transit authorities within each state must sign an agreement establishing the UCP for that state and submit an implementation plan to USDOT for approval. The UCP must be fully operational no later than 18 months after USDOT approves the plan. The majority of the states and transit authorities (72 percent) we surveyed indicated that their UCPs were in some stage of development or implementation while 7 percent indicated that their UCPs were fully implemented, 14 percent reported that they had not yet started to develop their UCPs; and the remaining 6 percent noted that their UCPs were in some other stage of development.[24]

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[24] Percentages do not add to 100 percent because of rounding.

New Regulations Make Application to and Adminstration of the DBE Program More Difficult

Fifty-four percent of the states and transit authorities we surveyed indicated that the new regulations had made it somewhat or much more difficult for DBEs to apply to the DBE program. This view could be attributable to the requirement for additional documentation that DBEs must now submit specifically, documentation of the personal net worth of the individuals who own and control the firms. Furthermore, when states and transit authorities were asked to identify barriers to firms' participation in the DBE program, the two most common barriers cited were (1) reluctance to provide personal information and (2) the time required for certification paperwork. Despite these problems, most states and transit authorities (58 percent) indicated that they believe the benefits to firms participating in the DBE program outweigh any costs.

In addition, states and transit authorities reported that the new regulations made it more difficult to administer the program. For example, 59 of 82 states and transit authorities we surveyed reported that the new regulations had made it somewhat or much more difficult to administer the DBE program while 9 states and transit authorities indicated that the new regulations had made it easier to administer the program.[25] Fourteen states and transit authorities reported that there was no change or they had no basis to judge. It is not surprising that most states and transit authorities reported that the new regulations made it more difficult to administer the DBE program, since the new regulations required that they completely overhaul their DBE goal-setting process and collect more information from DBEs and non DBEs.

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[25] One survey respondent did not answer this question.

One source of frustration for states and transit authorities appears to be the process for developing and approving .the new DBE program plans. The new regulations required that states and transit authorities develop acid submit plans for fiscal year 2000 that reflected the requirements and changes under the new regulations to USDOT by August 31,1999- about 6 months after the effective date of the new regulations. During the approval process, USDOT sometimes sent the DBE plans back to states and transit authorities multiple times for revisions and clarifications.[26] One state noted that even after it had worked closely with USDOT's local office to develop its plan, USDOT headquarters twice rejected the plan. On average, it took USDOT 8 months to approve the 2000 DBE plans. According to our survey results, one state and seven transit authorities reported that their 2000 DBE plans had yet to be approved.

Limited Data Are Available on the Characteristics of DBEs and Non-DBEs

A lack of key information prevents anyone from gaining a clear understanding of firms that participate in the DBE program and how they compare with the rest of the transportation contracting community. For example, we cannot use the information provided by the states and transit authorities we surveyed to calculate the total number of certified DBEs nationwide because of duplication in the states and transit authorities, DBE directories. In addition, almost two-thirds of our survey respondents could not provide information on the annual gross receipts of DBEs or the personal net worth of the individuals who own and control DBEs- information that is used to determine firms' eligibility for the program but is not reported to USDOT and was not

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[26] According to USDOT, the plans were reviewed to ensure that they met legal requirements.

readily available. Furthermore, almost 95 percent of the states and transit authorities we surveyed could not provide information on the annual gross receipts of non.-DBEs and none could provide information on the personal net worth of the individuals who own and control non-DBEs. While financial information on DBEs and non DBEs is lacking, most states and transit authorities could provide some other type of information on DBEs, such as the total number of prime contracts awarded to DBEs-information that is regularly reported to USDOT. These data indicate, among other things, that DBEs received about 7 percent of the prime contracts awarded and 2 percent of the federal dollars awarded for prime contracts i3n fiscal year 2000.

Duplication and Data Problems Preclude Thorough Analysis of the DBE Community

We cannot calculate the total number of certified DBEs nationwide because of duplication in states' and transit authorities' DBE directories. States and transit authorities are required to maintain DBE directories that list all the DBEs they have certified.[27] However, DBEs can be certified multiple locations. For example, a DBE may be certified by Virginia, Maryland, Pennsylvania, and the District of Columbia. Unlike the SBA's Small and Disadvantaged Business program, which gives a unique identification number to each certified small and disadvantaged business, the DBE regulations do not require states and transit authorities to assign unique identifiers to certified DBEs. As a result, a DBE certified with four states would be listed in four different DBE. directories. Because of this duplication,

[27] The DBE directories must be updated at lest annually.

aggregating the number of certified DBEs listed in states' and transit authorities' DBE directories would significantly overstate the number of firms certified. While we cannot provide the total number. of certified DBEs nationwide, our survey results indicate that the number of certified DBEs per state and transit authority varies greatly. For example, in fiscal year 2000, the number of certified DBEs per state or transit authority ranged from 39 in the state of Maine[28] to 3,350 in the Metropolitan Atlanta Rapid Transit Authority, with an average of 551 per state and transit authority.

Although FHWA could provide information on the demographics of DBEs that obtain highway contracts, FTA could not provide comparable data. As a result, the demographics of the entire DBE community are unknown. FHWA's data on DBE participation indicate that nonminority-women owned businesses obtain a significant portion of contracts. Prior to 1987, states and transit authorities could not generally count contracts with nonminority-owned businesses toward DBE goals. The Surface Transportatton and Uniform Relocation Assistance Act of 1987 included nonminority women-owned businesses in the statutory definition of socially and economically disadvantaged individuals and thus allowed states and transit authorities to use contracts with both minority- and nonminority women owned businesses to meet their DBE goals. According to FHWA's data, nonminority-women-owned businesses have become one of the most competitive groups in the DBE community since 1987. For example, in 1999 (the latest year for which these data are available), nonminority-women-

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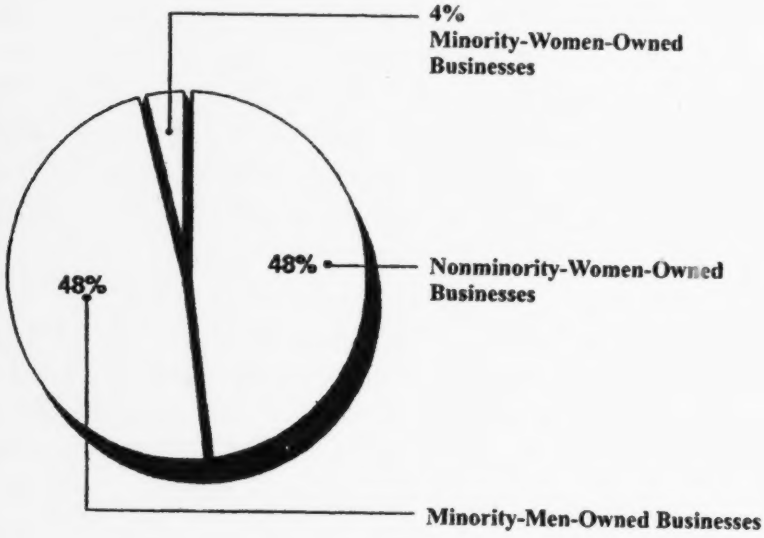
[28] The Metropolitan Transit Authority of Harris County (Houston, Texas) reported that it had no certified DBEs in 2000. According to USDOT, the Metropolitan Transit Authority has a DBE program, with a anal intended to be met with all race-neutral participation, but does not certify firms itself.

owned businesses accounted for about 48 percent of all federal highway contract dollars awarded to DBEs; minority-owned- businesses (those owned by both men and women) combined accounted for about 52 percent. (See fig.1.) FTA was unable to provide reliable data on the demographics of the DBEs that were awarded federal transit contracts, even though transit authorities must provide this information to FTA on a quarterly basis.[29] According to FTA, it does not centrally compile this information.

Figure 1: Percentage of Federal Highway Contract Dollars awarded to DBEs, Fiscal Year 1999



Source: FHWA.

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[29] States and transit authorities must submit certain information about DBEs to USDOT on a quarterly basis, such as number of firms awarded prime and subcontracts, the ethnicity of the firms' owners, and the type of work the firms perform.

Data Are Available to Calculate Participation Rate of DBEs in Prime Contracts but Are Limited for Subcontracts

The majority of the states and transit authorities we surveyed (78 percent) provided sufficient data-that is, the number and value of prime contracts awarded to DBEs and non-DBEs-to determine DBEs participation rates in prime contracts.[30] According to the data we obtained from these states and transit authorities, DBEs received about 7 percent of the prime contracts awarded and 2 percent of the federal dollars awarded for prime contracts in fiscal year 2000. In comparison, about 70 percent of the states and transit authorities could not provide both the number and value of subcontracts awarded to DBEs and non DBF.--information necessary to calculate DBEs' participation rates in subcontracts. Because DBEs are small businesses and are more likely to compete for subcontracts, which generally require fewer resources (e.g., capital, equipment, and employees) than prime contracts, the lack of subcontracting data. prevents anyone from gaining a complete understanding of DBEs' participation in transportation contracting. The data provided from about one-third of the states and transit authorities indicate that DBEs received about 33 percent of all subcontracts awarded and 26 percent of the federal dollars awarded through subcontracts in fiscal year 2000. However,

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[30] We measured DBEs' participation rates in USDOT assisted contracts using both the number and value of the prime and subcontracts awarded.

because this information is based on a small number of states and transit authorities it may not be representative and therefore should not be generalized to the entire DBE community.

The participation rates of DBEs in both prime and subcontracts in fiscal year 2004 indicate that they received a relatively small percentage of. federal prime and subcontracts and dollars when compared with non-DBEs. However, we do not know whether the percentage is disproportionately low. Such a determination cannot be made without an accurate measure of the availability of DBEs-that is, the number of DBEs "ready, willing, and able" to participate in prime and subcontracts compared with the number of non DBEs.

Financial Profile of DBEs Cannot Be Determined With Current Data

The majority of states and transit authorities responding to our survey could not provide information on the annual gross receipts of DBEs. Specifically, 60 percent of these states and transit authorities could not provide information on the annual gross receipts of the DBEs that were awarded prime or subcontracts in fiscal year 2000. Furthermore, 75 percent of the states and transit authorities could not provide information on the annual gross receipts of the DBEs that were not awarded prime or subcontracts in fiscal year 2000. While the

annual gross receipts of a DBE are required to determine the firm's eligibility for the program, this information is not reported to USDOT. The primary reason survey respondent cited for not being able to provide the information was that the information is not in an electronic database and therefore would be I difficult and time-consuming to compile. The information that was provided from a limited number of states and transit authorities indicates that most DBEs' annual gross receipts are below $5 million well below the current USDOT specific cap of $17.4 million. Furthermore, 85 percent of the DBEs awarded contracts in fiscal year 2000 had annual gross receipts of less than $5 million. In comparison, 94 percent of the DBEs that did not receive a contract in fiscal year 2000 had annual gross receipts of less than $5 million. However, because this information is based on only a small percentage of the states and transit authorities we surveyed, it may not. be representative and therefore should not be generalized to the entire DBE community (For more detailed information see app. II.)

The majority of the states and transit authorities we surveyed could not provide information on the personal net worth of the individuals who own and control DBEs. Specifically, about 65 percent of the states and transit authorities indicated that they could not provide information on the personal net worth of the owners of DBEs that were awarded prime contracts in fiscal year 2000. Sixty seven percent of the states and transit authorities reported that they. could not provide information on the personal net worth of the owners of DBEs that were awarded subcontracts in fiscal year 2000. In addition, 81 percent of the states and transit authorities indicated that they could not provide information on the personal net worth of the owners of DBEs that were not awarded prime contracts in fiscal year 2000. Seventy-eight percent of the states and transit authorities indicated that they could not provide information on the personal net worth of the owners of DBEs that were not awarded subcontracts in

fiscal year 2000. Similar to the information on a firm's annual gross receipts, personal net worth information is required to determine a firm's eligibility for the program but is not reported to USDOT Since this eligibility requirement was introduced in the new regulations, states and transit authorities are just starting to collect this information.[31] Over 60 percent of the states and transit authorities indicated that they could not provide this information because it is not electronically maintained and therefore would be difficult and time-consuming to compile and report.

The information that was provided from a limited number of states and transit authorities indicates that over half of the DBEs that received prime and subcontracts in fiscal year 2000 had owners whose personal net worth was less than $250,000. Additionally, the data indicate that the personal nworth of the owners of DBEs receiving prime contracts was higher than the personal net worth of the owners of DBEs receiving subcontracts. However, because this information is based on the responses of a small percentage of all states and transit authorities, it may not be representative and therefore should not be generalized to the entire DBE community. (For more detailed information see app. II.)

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[31] According to the regulations, firms applying to the DBE program must provide a signed and notarized statement of personal net worth from the individuals whose net worth is used to determine the firms DBE eligibility. Firms that were participating in the program before the effective date of the new regulations (Mar. 1999) would have to submit the information the next time they applied for recertification, which occurs every 3 years. Hence, information on personal net worth may not be collected from all DBEs until fiscal year 2002.

Lack of Data Prevents a Financial Profile of Non-DBEs

Currently, the financial status of DBEs cannot be compared transportation contracting community as a whole because most states and transit authorities do not collect or maintain financial information on nonDBEs. For instance, over 90 percent of the states and transit authorities responding to our survey could not provide information on the annual gross receipts of non-DBEs. The primary reason for not being able to report the information was not having it in an electronic database. The new regulations require states and transit authorities to collect information on the annual gross receipts of the non-DBEs that bid on their USDOT assisted contracts. This information is to be included in the states' and transit authorities' bidders lists. According to USDOT, states and transit authorities have expressed concern about their ability to collect this information because non DBEs have been reluctant to share this information.

No survey respondent could provide information on the personal net worth of the owners of non-DBEs that were awarded prime or subcontracts in fiscal year 2000. The majority of the states and transit authorities (61 percent) indicated that they do not currently collect this information or plan to do so in the future. Only 8 percent reported that they plan to collect this information in the future. States and transit authorities are not required to collect information on the personal net worth of the owners of non DBEs.

Information on Discrimination and Other Barrier's That May Limit DBEs

There are numerous sources that could contain information relevant to whether discrimination limits the ability of DBEs to compete for USDOT assisted contracts, inducing studies of lending, bonding, and business practices affecting the formation and competition of minority firms; state and local

disparity studies; discrimination complaints; and relevant court cases. We focused our review on court cases involving the federal DBE program since the Supreme Court's 1995 decision in Adarand Constructors, Inc. v. Pena, transportation-specific disparity studies published between 1996 and 2000; and written complaints of discrimination filed by DBEs with states, transit authorities, and USDOT We focused on these sources because they are directly related to transportation contracting and the federal DBE program. However, we did not address whether the DBE program satisfies the requirements of strict scrutiny and is therefore constitutional. In our review, we found the following.

- The courts that have considered the constitutionality of the federal DBE program under the standard articulated in the Supreme Court's 1995 decision in the Adarand case have concluded that discrimination -adversely affects DBEs.

- All 14 studies we reviewed found that there were disparities between the availability and utilization of minority-and women-owned business enterprises (MBE/WBEs) in transportation-contracts.[32] Taken as a whole, these studies suggest that disparities exist. However, none provide reliable evidence of disparity because the limited data used to calculate disparities, compounded by methodological weaknesses, create significant uncertainties about the studies' findings-that is,

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[32] No studies did not have enough data to perform a statistically valid disparity ratio analysis of transportation-specific contracts, and instead conducted disparity analyses of contracts awarded by several agencies including the transportation agencies Several studies analyzed disparity separately within sub-groups of MBE/WBEs. Disparity was found in at least one subgroup, but not in all of them

they could result in either an overstatement or an understatement of MBE/WBEs' availability and utilization

- USDOT does not systematically track information on the discrimination complaints filed by DBEs--information that could shed light on the existence of discrimination against DBEs.

In addition, a number of factors are often cited by agency officials and representatives from both industry and minority associations as limiting DBEs' ability to compete for contracts. These factors include a lack of working capital and limited access to bonding. However, there was little agreement among the officials we contacted about whether these factors are attributable to discrimination or are barriers that all small businesses face.

Courts Have Found Sufficient Evidence of Discrimination Justify the Federal DBE Program

In order to uphold a program, such as the federal DBE program, that uses race or ethnicity as a criterion for decision-making, a court must find sufficient evidence of discrimination to conclude that the pro a compelling governmental interest. Therefore, cases considering the constitutionality of the federal DBE program can indicate whether discrimination adversely affects DBEs' participation in transportation contracting. The courts that have addressed the DBE program under the standard articulated by the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Pena* (discussed on page 13 of this report) have found that the evidence of discrimination presented was sufficient

for them to conclude that the program serves a compelling governmental interest, specifically, remedying the effects of discrimination against DBEs.[33]

Most recently, in its review of the DBE program in Adarand, the Tenth Circuit Court of Appeals concluded that discrimination adversely affects both the formation of qualified minority subcontracting businesses and their ability to successfully compete for highway construction subcontracts.[34] On the basis of the evidence presented,[35] the

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[33] Several additional challenges to the constitutionality of the DBE program are in various stages of litigation In addition, in 1996, a district court in Texas concluded that the DBE program of the Metropolitan Transit Authority of Harris County was unconstitutional and called into question the constitutionality of the federal DBE program as well. See *Houston Contractors Ass'n v. Metropolitan Transit Authority of Harris County,* 993 F Supp. 545 (S.D. Tex. 1997). The court did not, however, assess whether the programs served a compelling governmental interest. The Fifth Circuit Court of Appeals set aside the district court's decision and sent the case back to the district court for further review.

[34] As discussed earlier, the Tenth Circuit Court of Appeals reversed a 1997 district court decision finding that the subcontracting compensation clause and DBE provison were unconstitutional. The district court had found that the programs at issue served a compelling interest, but were not narrowly tailored. The district court's findings regarding discrimination were adopted by another district court addressing a constitutional challenge to the DBE provision, the Department of Transportation's implementing regulations, and the state of Minnesota's federal DBE program. In that case, the district court found that the DBE program satisfied the first element of strict scrutiny on the basis of the district court's 1997 decision in *Adarand.* However, as in *Adarand,* the court concluded that the program was not narrowly

court found that discrimination by prime contractors, unions, and lenders impedes the formation of qualified minority businesses in the subcontracting market nationwide. The court also acknowledged the causal link between the availability of capital and the ability to implement public works construction projects and found that the studies cited by the government strongly supported a finding of discrimination in lending. For example, it cited a survey of 407 business owners in the Denver area that found significant differences in the loan denial rate for. white, African-American, and Hispanic business owners, even after controlling for other factors like size and net worth.

The court also addressed barriers to competition by existing minority businesses. Citing congressional hearings and statistical evidence, among other things, the court found that minority businesses are often excluded by business networks of prime and subcontractors from opportunities to bid on construction projects. The court also discussed bonding requirements, finding another barrier to competition. For example, it cited a Louisiana study finding that minority firms were nearly twice as likely to be rejected for bonding; three times more likely to be rejected for bonding in amounts

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tailored to serve the identified compelling interest *See In re: Sherbrooke Sodding,* 17 F Supp. 2d 1026 (D. Minn..1998).

[35] Throughout its decision, the court referred to the congressional investigations, hearings, statistical and anecdotal evidence, and other studies cited in a 1996 Department of Justice review entitled "The Compelling Interest for Affirmative Action in Federal Procurement," 61 Fed. Reg. 26050 (1996). As a preliminary matter, the court found that the federal government need not be as geographically limited as states and local governments in remedying the effects of discrimination in markets created by the disbursement of federal funds.

over $1 million; and, on average, charged higher rates for the same bonding policies than white firms with the same experience. Similarly, the court accepted evidence of suppliers' withholding price discounts from minority subcontractors, thus driving up their bids. In light of this evidence, the court rejected Adarand Constructors' argument that minority businesses face the same problems as all new businesses, regardless of the race of the owners.

Finally, the court considered disparity studies conducted by state and local governments.[36] In doing so, the court accepted the government's finding, based on a review of disparity studies, that minority construction subcontracting firms received 87 cents for every dollar that they would be expected to receive given their availability. The court also acknowledged the potential for weaknesses in the data and methodology used in disparity studies and stated that particular evidence undermining the reliability of specific studies would be relevant to a determination regarding discrimination. However, it noted that Adarand Constructors had not provided it with evidence undermining the studies' reliability.[37] Furthermore, the court found that Adarand

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[36] Although states and local governments do not conduct disparity studies to justify the federal DBE program, the Department of Justice review stated that disparity studies conducted by states and local governments throughout the country in connection with their own programs are of particular relevance to affirmative action measures in federal programs providing, grants to such entities.

[37] The court acknowledged the need for studies to take into account the special qualifications needed to undertake the task at issue. However, the court stated that it was unaware of such qualifications, aside from the general qualifications necessary to operate a construction contracting business, and that the record was without evidence that the subcontractors who had

Constructors had failed to introduce credible, specific evidence to refute the government's showing of a compelling interest.[38] As a result, it held that there was sufficient evidence of discrimination to justify the use of racial and ethnic criteria in transportation contracting.

Data and Methodological Weaknesses Limit the Findings of Transportation-Specific Disparity Studies

Fourteen recent, transportation specific disparity studies[39] concluded that disparities existed between the utilization of MBE/WBEs in transportation contracts and available of these firms in the marketplace.[40] Numerous state and local

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been utilized had performed inadequately or otherwise demonstrated a lack of necessary qualifications.

[38] The court also "[took] notice" of evidence of the link between the discontinuance of a race-conscious program and minority business participation in the relevant market. The court stated that this evidence supported the claim of discriminatory barriers to participation by minority contractors.

[39] We defined recent, transportation-specific disparity studies as studies published between 1996 and 2000 containing a separate disparity analysis on transportation contracting.

[40] We chose to review transportation-specific disparity studies published between 1996 and 2000, in part, because the new DBE regulations recommend that any disparity study relied on in the DBE goal-setting process should be as recent as possible and focused on the transportation contracting industry. We reviewed two additional transportation-specific studies published between 1996 and 2000 that examined minonty- and women-owned business procurement, One of these studies did not use a traditional disparity ratio and thus is not included in our discussion However, we did review the

governments have used disparity studies to support their minority contracting Programs and in setting their federal DBE goals. For example, about 30 percent of the states and transit authorities we surveyed reported that they used a disparity study to help set their fiscal year 2000 DBE participation goals. However, our review of the 14 disparity studies found that the limited data used to calculate disparities, compounded by methodological weaknesses, create uncertainties about the studies' findings.[41] Rather than discuss the limitations of each study specifically, we have chosen to discuss some of the more common problems we found. While not all studies suffered from every problem, each suffered from enough problems to make its findings questionable. We recognize that there are difficulties inherent in conducting disparity studies and that such limitations are common to social science research; however, the disparity

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study and found that it contained methodological weaknesses that create uncertainties about its findings. The other study was considered a work in progress and thus was not included in our discussion Both of these studies used new approaches to identify barriers to full and active MBE/WBE participation. For example, one study disaggregated the procurement process into discrete components to determine if any individual procurement practice negatively affects MBE/WBEs. USDOT has not conducted any disparity studies or any other type of analysis examining discrimination in federal transportation contracting because it believes such studies or analyses are not needed to justify the federal DBE program.

[41] Because our review of transportation-specific disparity studies was limited, our conclusions cannot be generalized to disparity studies as a whole. Moreover, the findings in any disparity study would be limited to the geographical scope of that particular study.

studies we reviewed did not sufficiently address such problems or disclose their limitations. It is not clear what conclusions a court would draw about the studies' findings.

The studies we reviewed relied on a disparity ratio-that is, a comparison of the availability of MBE/WBEs to their utilization in contracts--as an indicator of discrimination However, the data necessary to properly calculate such ratios-complete and accurate lists of MBE/WBEs' availability and utilization-are often lacking. An availability list should include all qualified, willing, and able firms in the relevant market area, grouped by industry subspecialties and by MBE/WBE or non MBE/WBE status. A utilization list should include all firm in the relevant market area that were awarded prime and subcontracts, grouped by industry subspecialty and MBE/WBE or non MBE/WBE status. Because these data are often lacking, some proxies (i.e., substitute information) have been used to calculate disparity ratios.

To develop proxies of availability, the disparity studies we reviewed used sources including Census Bureau data, directories or other listings of firms, prequalification lists,[42] and/or bidders lists. These could be useful data sources. However, all of these data sources have shortcomings, whether used separately or in combination, that must be taken into account when using them as proxies for availability. Such shortcomings would result in availability lists that could either under- or overstate the number of firms available for transportation contracting. The limitations of using these data sources as proxies for availability, include the following:

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[42] A prequalification list, sometimes referred to as a precertification list, includes all firms that have been prequaiified by states or transit authorities to compete for contracts.

- Census Bureau data cannot adequately indicate weather a firm is truly available, that is, whether it has the qualifications, willingness, or ability to complete contracts. However, in using Census Bureau data, the studies depicted all operational firms as available for contracting. Some studies attempted to account for the qualifications of firms by including only firms in the relevant two-digit Standard Industry Classification (SIC) codes in their availability lists.[43] Using a finer degree of distinction (e.g., classification by the four-digit SIC code level) would help to ensure that firms are enough for comparison. For example, some studies used the two-digit SIC code for heavy construction, a category that includes firms as diverse as general contractors for highway construction and general contractors for radio tower construction.

- Directories and other listings do not contain information on firms' qualifications, willingness, or abilities. This could result in an overstatement of how many firms are available for transportation contracting. In addition, some of the data obtained from directories and listings were inaccurate. For example, some of the disparity studies we reviewed indicated that as many as 16 percent of the firms included in the directories and listings were unreachable because of such problems as disconnected telephones, wrong telephone numbers, incorrect addresses, or dissolution of the firms.

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[43] SIC codes are used to identify companies by their primary business activity. The activity is determined by the major product produced or service rendered. The coding system consists of major industries that are further divided into a multitude of minor groups identified by a four-digit SIC code.

- Prequalification and bidders lists may be better sources of availability than Census Bureau data or directories because they better approximate firms' qualifications, willingness, and ability to compete for contracts. However, the mechanisms used by ;states and transit authorities to compile them may limit their reliability. In the studies we reviewed, we found four problems. First, some studies we reviewed used bidders and prequalification lists that were updated infrequently or had no mechanism to ensure that firms no longer available were removed from the list. For example, one study used a list that never removed firms, increasing the risk that it contained firms no longer in business in the relevant market area. Second, some studies we reviewed used bidders or prequalification lists that were maintained for multiple city agencies, ranging from school districts to port authorities. Businesses qualified to perform school district work may not be qualified to perform port authority work. Third, the lists grouped all potential firms together, failing to take into account their industry subspecialty and capacity. Because of these problems, availability lists based on this information would overstate the number of firms that were qualified, willing, and able to perform transportation contracts. Finally, prequalification and bidders lists could under represent capable firms. Firms may refrain from participating because of perceived or actual barriers. For example, one study we reviewed surveyed firms and found that only 22 percent of those firms that expressed an interest in contracting with the transit agency had actually attempted to obtain such work in the past.

The disparity studies we reviewed made few efforts to mitigate the problems with using these data sources as proxies for availability, nor did they disclose the limitations of their use. For example, the disparity studies did not sufficiently account for the lack of information on firms' qualifications

when the availability lists were developed. One aspect of a firm's qualifications is its capability to handle transportation contracting. Some studies used average yearly revenge as a proxy for capability.

However, revenue does not adequately explain the differences in firms' capability. For example, two firms could have similar yearly revenues, but one firm. might have performed 100 small contracts throughout the year because it did not have the capacity to perform large contracts, whereas the second firm might have performed two very large contracts. If revenue were used as a proxy for capability, these two firms would be considered equivalent.

In addition to determining the availability of firms, disparity studies must measure the utilization of MBE/WBEs to determine if disparities in contracting exist. This requires an analysis of both the number and dollar amount of contracts awarded to MBE/WBEs and non-MBE/WBEs. Such measurement is difficult because some states and transit authorities have incomplete records of the prime and subcontracts they have awarded. For example, several studies we reviewed did not include any analyses of subcontracting and therefore may understate the utilization of firms. Because MBE/WBEs are more likely to be awarded subcontracts than prime contracts, MBE/WBEs in particular may appear underutilized when the focus remains on prime contractor data. Furthermore, although some studies did include calculations based on the number of contracts, all but two based their determination of disparities on only the dollar amounts of contracts. Because MBE/WBEs tend to be smaller than non-MBE/WBEs, they are often unable to perform larger contracts. Therefore, it would appear that they were awarded a disproportionately smaller amount of contract dollars. A more complete indicator of utilization would consider both the dollar amount and the number of contracts awarded or to control for differences in contract dollar amounts.

USDOT Has Not Provided Criteria for Reliability of Disparity Studies Used to Set DBE Goals

In March 2001, USDOT advised states and transit authorities that disparity studies used to set their DBE participation goals should be reliable. While pointing out that all or part of a disparity study pertaining to a local market area could provide a rich source of information for the goal setting process, USDOT did not explain how states and transit authorities could evaluate the reliability of such studies. USDOT's guidance does not, for instance, caution against using studies that contain the types of data and methodological problems that we identified above. Without explicit guidance on what makes a disparity study reliable, states and transit authorities risk using studies that may not provide accurate information in setting their DBE goals.

Data on Written Discrimination Complaints Are Inconclusive

USDOT receives written complaints of discrimination from DBEs but does not systematically track or analyze information on these complaints.[44] As a result, this information is not readily available to shed light on the absence or presence of discrimination against DBEs. USDOT could not provide the total number of written complaints filed by DBEs for two reasons. First, while USDOT's Office of Civil Rights (DOCR) records the complaints and assigns identification numbers before routing them to FTA or FHWA

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[44] We did not review USDOT's response. to individual written complaints of discrimination.

complaints of discrimination under the DBE regulations or regulations issued under title VI of the Civil Rights Act of 1964; however, DOOR does not record which title VI complaints are filed by DBEs. Similarly, FTA does not separately track the title VI complaints filed by DBEs- Because of these two problems, information provided by USDOT would likely understate the number of complaints of discrimination filed by DBEs.

In addition, USDOT could not provide the total number of investigations launched as a result of the written discrimination complaints filed by DBEs or information on the outcomes of these investigations. In order to determine whether the discrimination complaints filed by DBEs have merit, the number of investigations launched and the outcomes of the investigations are critical pieces of information USDOT officials stated they do not track the number of investigations of written discrimination complaints filed by DBEs or the number of times discrimination was found through their investigations. To gather this type of information, USDOT officials stated one would need to go through each case file individually early 100 over the last several years, not including title VI complaints.

We also asked the states and transit authorities we surveyed about written discrimination complaints filed by DBEs in fiscal years 1999 and 2000. Eighty-one percent of the respondents reported that they had not received any written discrimination complaints filed by DBEs during this period. Nineteen percent of the states and transit authorities reported that they had received a total of 31 written discrimination complaints filed by DBEs in 1999 and 2000. Of the 31 complaints filed, 29 had been investigated. Four of these investigations resulted in findings of discrimination. While the number of complaints filed by DBEs with states and transit authorities may seem low, it is important to note that DBEs that believe they have been the victims of

discrimination have several options and may have elected to pursue action elsewhere. For example, a DBE could file a complaint with the responsible state or transit authority, USDOT, and/or the courts. In addition, USDOT officials stated that the number of written discrimination complaints filed (at any level) probably understates the level of discrimination for two reasons. Specifically, DBEs may choose not to file complaints because they believe the process is too time-consuming or burdensome or because they fear retribution (i.e., they would be denied future work).

Other Barriers May Limit DBEs' Ability to Compete for Contracts

Other factors may also limit the ability of DBEs to compete for USDOT- assisted, contracts. However, there was little agreement among the officials we spoke with as to whether these factors are due to discrimination or the nature of small businesses. According to our survey results, 80 percent of the states-and transit authorities responding had not conducted any type of - analysis on this subject.[45] In addition, neither USDOT, nor SBA, nor the industry groups we contacted had conducted any type of study on factors that may limit the ability of DBEs to obtain contracts.[46] The industry officials we spoke with often cited such factors as contract bundling; limited access to bonding, working capital, and credit; and prequalification requirements.

The most common factors cited as limiting DBEs' ability to compete for contracts are a lack of working capital and

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[45] Eight of the 17 states and transit authorities that had conducted such analyses reported that the analyses were included in their disparity studies.

[46] The 1996 Department of Justice review contained information on these factors.

limited access to credit and - bonding. For example, according to an association representing small minority-owned businesses, DBEs frequently lack the capital needed to finance jobs without drawing on credit and are denied credit because they - lack sufficient cash flow. Since these factors are widely perceived as limiting the ability of DBEs to compete for contracts, USDOT has established a number of services, including short-term lending and bonding assistance, to help overcome these barriers.

Another factor often cited as a barrier to DBEs' ability to compete for contracts is contract bundling. Contract bundling is the consolidation of two or more procurement requirements previously provided or performed under separate, smaller contracts into a solicitation of offers for a single contract.[47] The resulting contract is likely to be unsuitable for award to small businesses, such as DBEs, because of (1) the diversity, size, or specialized nature of the elements of the performance specified; (2) the aggregate dollar value of the anticipated award; (3) the geographic dispersion of contract performance sites; or (4) any combination of these three factors. USDOT officials stated that they believe contract bundling is one of the largest barriers for DBEs in competing for transportation contracts. GAO recently reported that there is limited government wide data on the extent of contract bundling and its effect on small businesses.[48]

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[47] A similar concept is contract consolidation. Contract consolidation occurs when agencies combine existing contracts into fewer contracts as a means of streamlining as well as reducing procurement and contract administration costs.

[48] Small Businesses: Limited Information Available on Contract Bondings Extent and Effects (GAO/GGD-00-82, Mar. 31, 2000).

Prequalificatlon requirements are also cited as a barrier for DBEs. Most states require that firms competing for prune contracts be prequalified, meaning they must prove to the state that they are capable of performing contracts. For example, firms must show that they have an adequate line of credit and are bonded. According to USDOT officials, these requirements can hurt DBEs because the firms may not have the working capital and access to credit required for prequalification.

Impact of the DBE Program

Several measures could be used to help determine the impact of the DBE program. TEA-21 directed us to analyze:

- the impact of the DBE program on costs, including the costs of a ring the program;
- the impact of the DBE program on competition and the creation of jobs; and
- the impact of discontinuing federal or non-federal DBE programs on DBEs.

Impact of the DBE Program on Costs Competition and the Creation of Jobs

USDOT, states and transit authorities incur costs in implementing and administering the DBE program. USDQT estimates that it incurred about $6 million in costs (including salaries and training expenses) to administer the DBE program for highways and transit authorities in fiscal year 2000.[49] Sixty-nine percent of the states and transit authorities

[49] According to USDOT, the costs incurred in fiscal year 2000 are higher than typical because of the work associated with

responding to our survey estimated that they incurred a total of about $44 million in costs, including certification costs, to administer the DBE program in fiscal year 2000. The costs incurred ranged from a high of $4.5 million to a low of about $10,000. In addition, 13 states and transit authorities incurred a total of about $250,000 in litigation costs in fiscal year 2000 that they attributed to the federal DBE program. Although it has been asserted that the DBE program increases the costs of contracting (referred to as additional construction costs), 99 percent of the states and transit authorities we surveyed had not conducted a study or analysis to determine whether the DBE program has an impact on their contract costs.[50] USDOT has also not conducted such an analysis.

Almost none of the states and transit authorities responding to our survey have analyzed the impact of the DBE program on competition and the creation of jobs. Nor has USDOT conducted this type of analysis. According to USDOT officials and representatives from transportation associations, the DBE program does not create jobs; rather it shifts jobs to individuals who might not receive the jobs otherwise. As USDOT officials noted, USDOT assisted contracts will be let regardless of the DBE program, and the program encourages greater racial and gender diversity within transportation contracting.[51] However, there is less agreement about the effects of the program on competition. Officials from USDOT

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the new regulations, such as training and reviews of recipients' new programs and goal setting methods. USDOT indicated that, during a typical year, it would incur about $3.5 million to administer the DBE program.

[50] The Dallas Area Rapid Transit (DART) reported that it is collecting information to determine the overall costs of unbundling larger contracts.

[51] We did not look at the make-up and number of employees that work for DBEs compared with non DBEs.

and a minority business group stated that the DBE program does not hurt competition, noting that the DBE program does not use quotas and that DBEs must compete with non-DBEs to receive USDOT-assisted contracts. Moreover, these officials commented that the DBE program enhances competition because it encourages greater participation by more firms. In contrast, representatives from transportation associations believe that the DBE program stifles competition in certain subcontracting areas (e.g., guardrail work) where there is an overconcentration of DBEs. Because of this overconcentration of DBEs, according to the transportation. associations, non-DBEs do not have an opportunity to work in those fields. Although USDOT does not have data indicating that overconcentration is a serious, nationwide problem, the new regulations authorized states and transit authorities to remedy situations in which an overconcentration of DBEs is limiting non-DBEs' ability to compete for contracts, such as varying the use of contract goals in these areas.

Impact of Discontinuing Federal and Nonfederal DBE Programs

limited data prevent a thorough assessment of the impact of suspending or repealing (discontinuing) federal or nonfederal DBE programs on DBEs' participation in transportation contracting. As evidence that the DBE program is needed, supporters often cite statistics on DBEs' participation in transportation contracting after minority- and women-owned business contracting programs are discontinued. An example used during the congressional debate preceding the passage of TEA-21 was the effect of discontinuing the state of Michigan's minority business contracting program in 1989. According to evidence cited during the debate, within 9 months of the suspension, the proportion of state highway dollars awarded to minority-owned businesses had dropped from 5 percent to 0 percent, while the proportion of state

highway dollars awarded to women-owned businesses had declined from about 10 percent to 1 percent. Moreover, these new low rates of participation in state transportation contracting by minority-and women-owned businesses were contrasted with these firms' participation rates in USDOT assisted contracts, which were significantly higher.[52] USDOT has not conducted studies or analyses measuring the impact of discontinuing federal or nonfederal DBE programs Most states and transit authorities that participated in federal DBE programs or nonfederal minority business enterprise and women business enterprise (MBE/WBE) contracting programs that were discontinued could not provide data that would allow us to thoroughly evaluate the impact of that action. For example, we identified one state and one transit authority that had discontinued their federal DBE programs as a result of a court order.[53] However, only the state could provide participation data that would allow us to evaluate the

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[52] Michigan could not provide us with minority and women-owned business participation data in state highway contracting for the years immediately before and after it discontinued its program. Furthermore, Michigan officials stated that the analysis showing the decline that is often cited was a one-time-only analysis and that the analysis is no longer available. Consequently, we cannot verify the numbers cited during the debate.

[53] In 1998, Minnesota's Department of Transportation (MNDOT) discontinued its federal DBE program when it was declared unconstitutional; however, MNDOT reinstituted its federal program under the new DBE regulations in 2000. The metropolitan Transit Authority of Harris County in Houston discontinued its federal DBE program in 1996 when its constitutionality was called into question. in 1995, it established a race and gender-neutral small business program, which FTA approved as its federal DBE program.

impact of discontinuing the federal DBE program. We also identified 10 states and transit authorities that had participated in nonfederal MBE/WBE programs that were discontinued prior to 2000.[54] Only one state could provide sufficient data for us to evaluate the impact of the action. Conversely officials from six states and transit authorities, inch ding Michigan, told us that participation data for minorities and women in state transportation contracting for the years immediately before and after- the discontinuance of their nonfederal MBE/WBE programs were not available. In addition, few of the states and transit authorities could pro vide equivalent data on non MBE/WBEs. This information is important to determine whether changes in MBE/WBEs' participation rates in state transportation contracting were similar to the changes in the participation rates of non-MBE/WBEs or unique to the MBE/WBE community. Consequently, we could not evaluate the impact of discontinuing these programs.

Two states-Minnesota and Louisiana-were able to provide sufficient data to assess the impact of discontinuing a federal and nonfederal program, respectively. we measured DBEs' and MBE/WBEs' participation using two indicators-(1) the number of transportation contracts awarded .and (2) the dollar amounts awarded through those contracts. The participation data from these states suggest that discontinuing these programs had a negative impact on DBEs' and MBE/WBEs participation in transportation contracting. For example, in Minnesota, DBEs' participation in federal transportation contracting remained relatively stable from 1995 to 1998. However, after the discontinuance of Minnesota's federal

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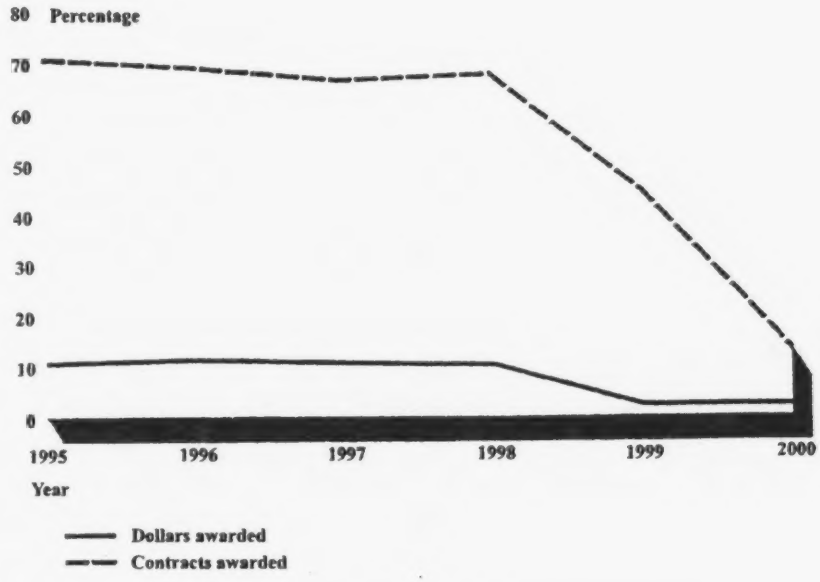
[54] Two other transit authorities had participated in minority- and women-owned business contracting programs that were discontinued in 2000. We did not try to obtain information from these two transit authorities because not enough time has elapsed for us to evaluate the impact of this action.

DBE program in 1998, DBEs' participation in federal transportation contracting dramatically declined. (See fig. 2.)

Figure 2: DBEs' Participation in Federal Transportation Contracting in Minnesota, 1995-2000



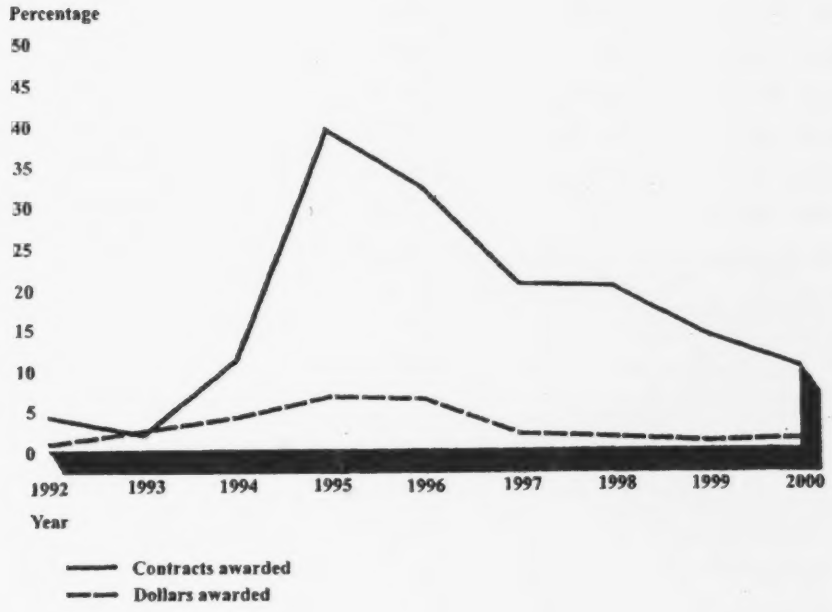
Source: GAO's analysis of data from Minnesota's Department of Transportation

Similarly, the data provided by Louisiana indicate that MBE/WBEs' participation in transportation contracting declined after Louisiana's nonfederal program was discontinued As shown in figure 3, MBW/WBEs' participation in state transportation contracting increased from 1992 to 1995. In 1996, the year the nonfederal program was discontinued, the participation rate of MBE/WBEs in state transportation contracting dropped and continued to decline over the next 4 years.[55] An official from Louisiana attributed

[55] We also obtained data on DBE participation in Louisiana's federal DBE program from 1995 to 2000. In our review of data on DBE and MBE/WBE participation in federally-assisted and state contracting, we did not observe a shift of

the decline in MBE/WBEs' participation in state transportation contracting to the removal of affirmative action requirements on state funded projects and the realization by contractors that efforts to include MBE/WBEs were no longer necessary.

Figure3: MBE/WBEs' Participation in Louisana's State-Funded Transportation Contracting, 1992-2000



Source: GAO's Analysis of data from Louisana's Department of Transportation.

MBE/WBEs to federally assisted contracts after the Louisiana's MBE/WBE program was discontinued.

Conclusions

The Congress identified and directed us to collect information that would shed light on the impact of the DBE program across the nation-including information on who benefits from the program, the financial status of the DBE community compared with that of the non-DBE community, and degree to which DBEs participate in transportation contracting. However, much of this information is not readily available from USDOT, states and transit authorities, and industry groups. Without this information it is impossible to define the universe of DBEs, compare them with the transportation contracting community as a whole or gain a clear understanding of the overall impact of the DBE program. In some cases, USDOT has mechanisms in place, such as its quarterly reporting requirement, that could be used to collect additional information, including the annual gross receipts of DBEs and non-DBEs as well as non DBEs' participation in subcontracting. In other cases, new mechanisms to collect or process the information are needed such as a method for determining the total number of certified DBEs nationwide. USDOT could also do more to analyze the information that is currently collected: By not systematically tracking and evaluating the total number of discrimination complaints filed by DBEs, the number of investigations launched, and the outcomes of the investigations, USDOT misses a opportunity to obtain information that could be used to identify trends and problem areas that may need attention. USDOT could also identify ways to improve the effectiveness of its own policies and guidance to states and transit authorities, and ultimately DBEs, by collecting and analyzing the information that the Congress has identified. Such information would help USDOT contribute to an informed congressional debate on the impact of the DBE program in connection with its reauthorization in 2003 and more effectively the program.

USDOT could also look for ways to provide more guidance to the states and transit authorities that are implementing the DBE program. Specifically, USDOT's new regulations put a mechanism in place for setting DBE goals and identified Census Bureau data and DBE directories, bidders lists, and disparity studies as data sources that states and transit authorities could use in setting these goals. However, in our review of disparity studies, we identified problems with these data sources that should be avoided or mitigated to help ensure that goals set by states and transit authorities are based on the level of DBE participation expected in the absence of discrimination -specifically, a level consistent with the availability of ready, willing, and able DBEs in the relevant market. USDOT provided examples of how to set DBE goals in its regulations, but has issued minimal guidance to the states and transit authorities on how to avoid the types of data and methodological problems we identified and ensure that the data sources used to set goals are as reliable as possible. USDOT could provide additional guidance to help states and transit authorities carry out the program.

Recommendations for Executive Action

To assist USDOT in administering the DBE program and to help inform the Congress about the impact of the program, we recommend that the Secretary of Transportation take the following steps:

- Develop and implement a method for states and transit authorities to assign unique identification numbers to DBEs so that the total number of DBEs certified nationwide can be determined.

- Amend the quarterly reporting requirements for states and transit authorities to include information on the annual gross receipts of DBEs

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Nos. 03-960 and 03-968

In the Supreme Court of the United States

GROSS SEED COMPANY, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

SHERBROOKE TURF, INC., PETITIONER

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the race-conscious provisions of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, and the Department of Transportation's revised implementing regulations, 49 C.F.R. Pt. 26 (2000), are constitutional.

2. Whether the court of appeals correctly held that Nebraska's and Minnesota's race-conscious Disadvantaged Business Enterprise Programs, implemented pursuant to TEA-21 and the Department of Transportation's regulations, are constitutional.

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In the Supreme Court of the United States

No. 03-960

GROSS SEED COMPANY, PETITIONER

v.

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MINNESOTA DEPARTMENT OF TRANSPORTATION, ET AL.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (03-960 Pet. App. 1a-14a; 03-968 Pet. App. 1a-17a) is reported at 345 F.3d 964. The opinions of the district courts in No. 03-960 (Pet. App. 15a-27a) and No. 03-968 (Pet. App. 18a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. The petitions for a writ of certiorari in

No. 03-960 and No. 03-968 were filed on December 30, 2003, and December 31, 2003, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases arise out of Congress's longstanding efforts to distribute federal highway construction and transit funds, and the opportunities created by those funds, in a manner that does not reflect or reinforce prior and existing patterns of discrimination on the basis of race and gender in those industries. They involve facial and as-applied constitutional challenges to the Transportation Equity Act for the 21st Century (TEA-21), the United States Department of Transportation (DOT) regulations implementing TEA21, and the States of Nebraska's and Minnesota's Disadvantaged Business Enterprise (DBE) Programs implementing TEA-21 and DOT's regulations.

1. a. Section 1101 of TEA-21, Pub. L. No. 105-178, 112 Stat. 111, and DOT's revised implementing regulations, 49 C.F.R. Pt. 26 (2000), are designed to remedy the effects of racial and sex discrimination in highway contracting and to ensure that federal dollars do not reinforce such discrimination.[1] The Act and DOT regulations authorize States and other recipients of federally-aided highway and transit projects to use race- conscious contracting remedies for socially and economically disadvantaged business enterprises. They require state and local governmental entities, as a con-

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[1] Section 1101(b)(1) states "Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 112 Stat. 113.

dition of receiving federal financial assistance for highway construction, to develop and implement DBE programs consistent with federal statutory and regulatory specifications.[2]

In 1995, in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (*Adarand I*), this Court considered an equal protection challenge to the federal DBE program enacted pursuant to TEA-21's predecessor statute. The Court held that the DBE program, as well as all other federally imposed race-conscious measures, must be evaluated under a strict scrutiny standard. As a result, in 1998, Congress debated whether it should reauthorize the DBE program. During those debates, both houses of Congress considered and soundly rejected, by bipartisan votes, two amendments that would have eliminated the DBE program. 144 Cong. Rec. 2797, 5565 (1998).

b. Prior to enacting TEA-21, Congress had evidence that DBEs continue to suffer the effects of discrimination that adversely affect their ability to participate on an equal opportunity basis in highway construction. The legislative record includes anecdotal evidence of

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[2] TEA-21 was initially set to expire on September 30, 2003. It has been extended twice while Congress has debated its reauthorization. The current extension will expire on April 30, 2004. See Surface Transportation Extension Act of 2003, Pub. L. No. 108-88, 117 Stat. 1110 (extending TEA-21 to February 29, 2004); Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, 118 Stat. 478 (extending TEA-21 to April 30, 2004). Both the House and Senate have passed reauthorization legislation with identical language, although the duration of the reauthorization has yet to be determined. See Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, S. 1072, 108th Cong., 2d Sess. § 1821 (Feb. 26, 2004); Transportation Equity Act: A Legacy for Users, H.R. 3550, 108th Cong., 2d Sess. § 1101(b) (Apr. 2, 2004).

intentional discrimination in awarding of subcontracts; pay disparities not explained by other factors; discrimination by non-governmental actors in the provision of business loans and bonding; and the adverse consequences of an "old boy" network that effectively excludes many minorities and women. See, *e.g.*, 144 Cong. Rec. at 2685, 2689-2690, 2699, 2706-2708; see also 64 Fed. Reg. 5100-5102 (1999) (summarizing). For example, a study of the construction industry supported by the United States Bureau of the Census and National Science Foundation found that "blacks, controlling for borrower risk, are less likely to have their business loan applications approved than other business owners," and generally receive smaller loans when approved. C. Grown & T. Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25-26, 39 (1992) (discussed by Rep. Norton, 144 Cong. Rec. at 10,656-10,657). Similarly, a 1997 survey of 58 state and local studies of disparity in government contracting found that "African Americans with the same level of financial capital as whites receive about a third of the loan dollars when seeking business loans." See M. Enchautegui et al., *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 36 (1997) (*Urban Inst. Rep.*) (discussed by Rep. Norton, 144 Cong. Rec. at 10,657-10,658). In addition, the legislative record includes numerous accounts detailing specific instances of discrimination against DBEs[3] as well as statistical data

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[3] See, *e.g.*, *Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance, and Urban Affairs*, 103d Cong., 2d Sess. 20 (1994); 144 Cong. Rec. at 2706-2708; *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand: Hearing*

and studies detailing varying amounts of underutilization of black, Hispanic, Asian, and Native-American owned businesses in government contracting.[4]

2. During the debates on TEA-21, members of Congress were aware that DOT, in response to this Court's *Adarand* decision, was substantially revising its regulations to help ensure that its DBE program satisfied strict scrutiny. 144 Cong. Rec. at 2685-2686, 2700-2702, 2708; *id.* at 2785-2787; *id.* at 10,370- 10,371. See, *e.g.*, H.R. Rep. No. 550, 105th Cong., 2d Sess. 4009-4010 (1998) ("The Department of Transportation is reviewing the DBE program in light of recent court rulings and has proposed new regulations to ensure that program withstands constitutional muster."). DOT issued those new regulations in February 1999. 49 C.F.R. Pt. 26 (2000).

DOT's revised DBE regulations require recipients of federal highway funds to adopt a DBE program and submit it to DOT for review and approval. DOT, consistent with TEA-21 (§ 1101(b)(2)(B), 112 Stat. 113), employs the definitions of "social[]" and "economic[]" disadvantage contained in the Small Business Act (SBA), 15 U.S.C. 631 *et seq.* Applicants are considered socially and economically disadvantaged if they have been "sub-

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Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. 55-56, 58-59, 64, 69, 74-76, 120 (1997) (*1997 ISTEA Hearing*).

[4] See, *e.g.*, *Urban Inst. Rep.* 11, 14-15, 19-22, 61; 144 Cong. Rec. at 10,371; *id.* at 2679-2680, 2699, 2794; Office of Advocacy, SBA, *The State of Small Business: A Report of the President* 1995 at 323 (1996); DOT, State of Colorado, *Disparity Study Final Report* (Apr. 1, 1998) (cited by Sen. Chaffee, 144 Cong. Rec. at 10,371); 2 State of Louisiana, *Disparity Study* 204-205 (June 1991) (cited by Sen. Kennedy, 144 Cong. Rec. at 2782). See also *1997 ISTEA Hearing* 55-56, 58-59, 64, 69, 74-76, 120.

jected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. 637(a)(5), *and* their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). Under Section 637(d)(3)(C)(ii) of the Small Business Act, African-Americans, Native-Americans, Asians and Hispanics are deemed presumptively economically and socially disadvantaged. Section 1101(b)(2)(B) of TEA-21 also deems women presumptively economically and socially disadvantaged. 112 Stat. 113.

DOT's revised DBE regulations employ enhanced regulatory safeguards to help ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged participate in a DBE program. Owners of firms applying for DBE certification, including those who are by statute deemed presumptively disadvantaged, must submit a signed and notarized statement saying that they are socially and economically disadvantaged and must disclose their personal net worth with appropriate documentation. 49 C.F.R. 26.67(a)(1) and (2)(i). If the individual's personal net worth exceeds $750,000 (excluding the value of the individual's home and equity in the business seeking certification), the presumption of economic disadvantage is conclusively rebutted and the individual is not eligible for certification in a DBE program. 49 C.F.R. 26.67(b)(1). The regulations further provide that (a) any person may challenge whether a specific DBE owner is in fact socially and economically disadvantaged, 49 C.F.R. 26.87; (b) a recipient of DOT financial assistance may at any time commence a proceeding to

rebut the presumption of disadvantage with respect to any individual, 49 C.F.R. 26.67(b)(2); and (c) DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e).

To help ensure that the use of race- and gender-conscious remedies for the effects of discrimination are tailored to local conditions, the regulations state that the recipient's overall annual goal for DBE participation must be "based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts" and that the "goal must reflect [the state or other federal funding recipient's] determination of the level of DBE participation [the recipient] would expect *absent the effects of discrimination*." 49 C.F.R. 26.45(b) (emphasis added). This two-step overall goal setting process begins with a determination of a base figure for relative DBE availability. 49 C.F.R. 26.45(c). States can choose from among several approaches, or a combination of approaches, for determining the base figure, including DBE directories and Census Bureau data, bidders lists, data from disparity studies, goals of another recipient in a substantially similar market, or any other methodology based on demonstrable evidence of local market conditions. 49 C.F.R. 26.45(c)(1)-(5). Next, recipients must determine what adjustments, if any, should be made to the base figure, based on an examination of all the evidence available in a jurisdiction, to arrive at the overall DBE participation goal. 49 C.F.R. 26.45 (d). The regulations also state that a recipient is not to be penalized simply

for failing to meet its annual overall DBE participation goal. 49 C.F.R. 26.41, 26.47.

The regulations prohibit the use of quotas and permit set-asides only in the most egregious instances of otherwise irremediable discrimination. 49 C.F.R. 26.43; 64 Fed. Reg. at 5107-5108. In addition, they require recipients to meet the maximum feasible portion of their DBE participation goal through race- and gender-neutral means. 49 C.F.R. 26.51(b). Race- and gender-conscious measures may be used *only* if race- and gender-neutral means will not permit achievement of the established goals, 49 C.F.R. 26.51(d), and recipients must discontinue use of all race- and gender-conscious measures if, at any point, it appears that they can achieve the DBE goal entirely through race-neutral means. 49 C.F.R. 26.51(f)(1). The DOT regulations also require that a prime contractor that demonstrates good-faith efforts in achieving DBE participation must be awarded a contract even if it fails to meet a specific DBE participation goal. 49 C.F.R. 26.53(a).

3. a. The Nebraska Department of Roads (NDOR) receives federal aid pursuant to TEA-21 for the construction of highways. To comply with TEA-21 and DOT's DBE regulations, NDOR analyzed conditions within the local highway construction market relating to DBE participation. As one method of complying with Section 26.45(c), NDOR utilized bid data to calculate the relative availability of DBEs in the local market by comparing the total number of ready, willing and able DBEs to all contractors. Then, in accordance with 49 C.F.R. 26.51(c), NDOR estimated the level of DBE participation that could be achieved with race- and gender-neutral measures by examining DBE participation levels in highway construction contracts with and without race-conscious goals. Based on this evidence,

NDOR set an overall annual goal for DBE participation of 11% for fiscal year 2000, and reduced it to 9.95% for 2001, of which it determined that 2.33% and 5.13%, respectively, could be achieved through race- and gender-neutral means. 03-960 Pet. App. 14a, 18a; 03-960 Pet. 9-10.

In March of 2000, DOT reviewed NDOR's then-current DBE program and determined that it complied with DOT's regulations. Although DOT does not specifically review every substantive decision made by a state implementing a DBE program, it did conclude that NDOR's goal-setting methodology satisfied the procedures set forth in 49 C.F.R. 26.45(f)(3) and that there was a valid basis under federal regulations for NDOR's adoption of its annual goals for fiscal years 2000 and 2001.

b. Petitioner Gross Seed specializes in landscaping and regularly bids on federally-assisted highway construction contracts in Nebraska as a prime contractor or subcontractor. 03-960 Pet. App. 16a. In March 2000, it filed a complaint against the State of Nebraska, alleging that it was denied a subcontract on a project funded by TEA-21 because of Nebraska's DBE program. Petitioner charged, in both facial and as-applied challenges, that the DBE provisions in TEA-21, DOT's regulations, and Nebraska's DBE program violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Petitioner sought monetary, injunctive, and declaratory relief. The United States, DOT, and the Federal Highway Administration, a DOT agency, intervened. Petitioner filed an amended complaint against the federal and state defendants. *Id.* at 15a-19a.

The district court conducted a seven-day bench trial. The evidence included 174 exhibits, most of which were

documents from the legislative record, as well as testimony of federal and state government officials responsible for administering and implementing the federal and local DBE programs, individuals affected by those programs, and experts who analyzed the legislative record. 03-960 Pet. App. 15a-20a.

c. On May 6, 2002, the district court, applying strict scrutiny, held that TEA-21 and DOT's DBE regulations are constitutional on their face and that NDOR's DBE program is constitutional as implemented. 03-960 Pet. App. 22a, 27a. The court found that Congress had "a strong basis in evidence" to support its conclusion that remedial action was necessary. *Id.* at 23a. Based on its review of the legislative record, the district court concluded that the factual predicate was sufficient to justify the race-conscious measures authorized in TEA-21 because the evidence "demonstrate[s] * * * racial and gender discrimination within the construction industry" and "Congress, through extensive research and hearings, determined that race-neutral measures alone would not entirely remedy the problem of past discrimination." *Id.* at 24a.

The district court also found that the DOT's DBE regulations are narrowly tailored on their face. 03-960 Pet. App. 24a-26a. The court noted that the regulations (a) require recipients to "meet the maximum feasible portion of their overall goal by using race-neutral means" (*id.* at 24a), (b) exclude firms owned by individuals who have a net worth in excess of $750,000 (*id.* at 25a), (c) guarantee that a recipient's annual goal reflects local market conditions (*ibid.*), and (d) limit the impact on non-DBE firms by virtue of their "'good faith' provisions" and local assessment (*id.* at 26a). The court also noted that the program is of limited duration, as TEA-21 would expire in 2003. The district court

therefore concluded that NDOR's implementation of the Federal DBE program was constitutional. *Id.* at 26a-27a.

4. a. The Minnesota Department of Transportation (MNDOT) receives federal aid pursuant to TEA-21 for the construction of highways. To comply with TEA-21 and DOT's DBE regulations, MNDOT analyzed conditions within the local highway construction market relating to DBE participation. As one method of complying with Section 26.45(c), MNDOT utilized bid data to calculate the relative availability of DBEs in the local market by comparing the total number of ready, willing and able DBEs to all contractors. Then, in accordance with 49 C.F.R. 26.51(a), MNDOT estimated the level of DBE participation that could be achieved with race- and gender-neutral measures by contrasting DBE participation levels in highway construction programs with and without race-conscious goals. Based on this evidence, MNDOT set an overall annual goal for DBE participation of 11.6% for fiscal year 2001. Minnesota noted that, in 1999, when its DBE program had been enjoined, DBE participation was 2.25%. MNDOT, therefore, concluded that it could meet 2.6% of its annual goal through race-neutral means, and 9% of its goal through race-conscious means. DOT reviewed MNDOT's then-current DBE program and concluded that it complied with DOT's regulations. 03-968 Pet. App. 22a.

b. Petitioner Sherbrooke Turf specializes in landscaping and regularly bids on federally-assisted highway construction contracts in Minnesota as a subcontractor. 03-968 Pet. App. 18a. In April 2000, it filed a complaint in federal court against the State of Minnesota, alleging that it was denied a subcontract on a highway project funded by TEA-21 because of Minnesota's DBE program. Petitioner charged, in both facial

and as-applied challenges, that the DBE provisions in TEA-21, DOT's DBE regulations, and Minnesota's DBE program violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Petitioner sought injunctive and declaratory relief. The United States, DOT, and the Federal Highway Administration intervened. *Id.* at 18a-19a.

c. On November 15, 2001, the district court granted defendants' motions for summary judgment. Applying strict scrutiny, the court held that TEA-21 and DOT's DBE regulations were facially constitutional and that Minnesota's DBE program was constitutional as implemented. 03-968 Pet. App. 27a-37a.

5. The court of appeals consolidated the cases on appeal and affirmed in both cases. 03-960 Pet. App. 2a-14a. The court stated that it "conduct[ed] a de novo review of th[e] legislative record," and "t[ook] a hard look at the evidence," applied this Court's decisions, and concluded that "Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary." *Id.* at 7a (citing *Adarand* v. *Slater*, 228 F.3d 1147, 1167-1176 (10th Cir. 2000) (finding legislative record sufficient to uphold the facial constitutionality of TEA-21 and DOT's regulations), cert. granted in part, 532 U.S. 967, cert. dismissed as improvidently granted, 534 U.S. 103 (2001) (*Adarand II*)).

The court of appeals rejected petitioners' argument that Congress (and the Tenth Circuit in *Adarand II*) had erroneously relied only on a federal document that summarized evidence relating to the compelling interest supporting racial preferences in contracting, *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (1996) (*Appendix*). The court stated, "Congress

has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry," 03-960 Pet. App. 7a, and that petitioner failed to "present affirmative evidence" to rebut the extensive legislative record. *Ibid.*

The court of appeals also rejected petitioners' contention that Congress, in order to enact TEA-21, must have had "strong evidence of race discrimination in construction contracting *in Minnesota and Nebraska*" to enact national remedial legislation. 03-960 Pet. App. 8a. The court stated, "[w]hen the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation." *Ibid.* The court of appeals further explained that it would consider petitioners' concern as to the alleged absence of discrimination in Nebraska and Minnesota in the context of its narrow tailoring analysis, holding that "a national program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis." *Id.* at 8a-9a.

The court of appeals then held that the federal DBE regulations are narrowly tailored on their face. The court emphasized that DOT's revised regulations place strong emphasis on the "use of race-neutral means to increase minority business participation in government contracting." 03-960 Pet. App. 11a (quoting *Adarand I*,

515 U.S. at 237-238). It noted that the DOT regulations require that the "'maximum feasible portion'" of a recipient's overall annual DBE participation goal be met with "race-neutral means," allow set-aside contracts only "when no other method could be reasonably expected to redress egregious instances of discrimination," and prohibit the use of quotas. *Id.* at 10a.

It also stressed that the current DBE regulations provide "substantial flexibility," 03-960 Pet. App. 11a, because a recipient of federal funds may seek waivers or exemptions from many of the regulatory requirements, may not be penalized for failing to meet an overall annual DBE participation goal as long as it exercises good faith, and must terminate use of race- or gender-based efforts when its goal can be met entirely through race- or gender-neutral means, *id.* at 10a-11a. The court of appeals also noted that an individual owner who has a net worth that exceeds $750,000 (excluding the individual's ownership in the applicant DBE firm and the individual's equity in his or her primary residence) cannot qualify as economically disadvantaged, *id.* at 11a, and stated that because TEA-21 is set to expire and requires congressional reauthorization for its continued operation, "the DBE program contains built-in durational limits," *ibid.*; see 49 C.F.R. 26.67(a)(2)(i) and (iii).

The court also underscored the importance of DOT's requirement that a recipient's DBE participation goals be tied to the relevant local market. 03-960 Pet. App. 11a-12a. It explained that, "in stark contrast" to the program struck down in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), DOT's regulations require "realistic goals for DBE participation" based on demonstrable evidence of local market conditions. 03-960 Pet. App. 12a. The court of appeals further noted that the

DOT regulations expressly declare that TEA-21's "statutory ten percent provision 'is an aspirational goal at a national level,' not a mandatory requirement for grantee States." *Id.* at 10a (quoting 49 C.F.R. 26.41(b)).

Relying on this Court's decisions applying strict scrutiny, the court of appeals explained that both "Congress and DOT have taken significant steps to minimize the race-based nature of the DBE program." 03-960 Pet. App. 12a. It explained that because the federal regulations create a rebuttable presumption of social and economic disadvantage, exclude firms owned by wealthy minorities, and allow individuals not deemed presumptively disadvantaged to demonstrate actual social and economic hardship, "race is made relevant in the program, but it is not a determinative factor," *ibid.* (citing *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2345-2346 (2003), and *Gratz* v. *Bollinger*, 123 S. Ct. 2411, 2429 (2003)).

Finally, the court of appeals held that both Nebraska and Minnesota had constitutionally implemented the federal DBE program. 03-960 Pet. App. 13a-14a. The court concluded that both States had satisfied DOT's regulatory requirement that its program be "demonstrably needed" by complying with federal regulations that require DBE participation goals to be based on "demonstrable evidence" reflecting the local level of DBE participation expected in the absence of discrimination, adjusted to account for the maximum portion of the goal that can be achieved through race-neutral means. *Id.* at 9a, 11a, 14a, 15a-16a. The court also concluded that petitioners "failed to prove that the revised DBE program is not narrowly tailored" as applied to their respective States. *Id.* at 13a, 14a.

ARGUMENT

This Court's review of the questions presented is not warranted at this time. In *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (*Adarand I*), this Court held that all race-conscious measures are subject to strict scrutiny. Since that decision, two federal courts of appeals and five district courts have reviewed TEA-21 and DOT's DBE regulations under strict scrutiny. Each of those courts has come to the same conclusion—that the record before Congress was, and remains, sufficient to permit Congress to enact a race- and gender-conscious DBE contracting program, and that DOT's extensive regulations, on their face, are narrowly tailored to achieve Congress's compelling remedial purposes. Indeed, DOT promulgated the current regulations and extensively altered the federal DBE program following this Court's decision in *Adarand I*, precisely to help ensure compliance with the strict scrutiny standard. The court of appeals correctly applied that exacting standard and concluded that the federal DBE program, and Nebraska's and Minnesota's implementation of that program, are constitutional. Because that decision is correct and does not conflict with any decision of this Court or of any other court of appeals, the petitions for a writ of certiorari should be denied.

1. Petitioners make a number of contentions about the adequacy of the record before Congress. 03-960 Pet. 17-20; 03-968 Pet. 5-10. None has merit or otherwise justifies this Court's review.

a. First, petitioners contend (03-960 Pet. 17-20; 03-968 Pet. 5-10) that the court of appeals erroneously held that Congress had a "strong basis in evidence" to support its conclusion that race-based remedial action was necessary. Petitioners argue that the court of appeals

did not undertake the detailed, skeptical analysis of the legislative record that strict scrutiny requires. As the court of appeals itself made clear, petitioners are mistaken.

After stating that petitioners argued for "a de novo review of this legislative record," the court of appeals stated that "[w]e agree we must take a hard look at the evidence, *and we have done so.*" 03-960 Pet. App. 7a (emphasis added). Many of the hearings, debates, and reports that are part of the legislative record compiled by Congress during the three decades in which it has been considering these types of contracting programs were included in the record before the court of appeals. The court discussed this extensive record and concluded that it satisfied the government's burden of showing "a strong basis in * * * evidence to support its conclusion that race-based measures were necessary." *Ibid.*

Petitioners' assertions that the court of appeals' conclusion was "based entirely on the Tenth Circuit's opinion in *Adarand II*" and that the court placed too much emphasis on the *Appendix*, 61 Fed. Reg. at 26,050 (03-960 Pet. 17, 18; see 03-968 Pet. 7-10) are equally mistaken. The court below merely stated that, after undertaking its own "hard look" at the extensive legislative record, it agreed with the Tenth Circuit's conclusion in *Adarand II* that that record was sufficient. 03-960 Pet App. 7a. That statement hardly indicates that the court of appeals here relied exclusively on the Tenth Circuit's decision or failed to conduct its own review of the legislative record. Nor is there any basis to conclude that the court of appeals placed too much emphasis on the *Appendix* document referenced by petitioners. Rather, the court examined the entirety of the legislative record, which "Congress * * * spent

decades compiling," *ibid.*, and concluded that it established a strong basis in evidence of the need for a race-conscious DBE program.

Accordingly, the issue of the level of review courts should give the legislative record is not presented in these cases, because the court of appeals expressly stated that it gave the record an appropriately careful review and nonetheless found the record sufficient. This Court initially granted review in *Adarand II* to consider whether the Tenth Circuit "misapplied strict scrutiny" by "applying a far more lenient standard to acts of Congress * * * than actions of state and local governments," see Pet. 5, *Adarand II*, *supra* (No. 00-730). Here, in contrast, the court of appeals specifically stated that it "t[ook] a hard look at the evidence," 03-960 Pet. App. 7a, and gave no indication whatsoever that it was applying a lenient standard or otherwise improperly deferring to Congress's findings. Thus, no question about the standard applied by the court of appeals is presented here, and petitioners' repeated attacks on the Tenth Circuit's decision in *Adarand II* are entirely misplaced.

b. Because these cases do not present the issue of whether the court of appeals applied the wrong legal standard in assessing the legislative record, all that remains is the question whether the court of appeals reached the proper conclusion about whether Congress had a strong basis in evidence to support its enactment of TEA-21. That inherently fact- intensive question is not the sort of issue that generally warrants this Court's review. See *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

In any event, the court of appeals' decision as to the sufficiency of the record before Congress is correct and in accord with the decisions of every other federal court

to consider the question. The record before Congress amply demonstrated a "strong basis in evidence" to support the enactment of the DBE provision in TEA-21 and DOT's DBE regulations, which authorize the use of race-conscious contracting preferences in jurisdictions where their use is manifestly necessary to remedy the effects of identified local discrimination. As summarized above, see pp. 3-5, *supra*, it includes evidence that decades of private and, at times, governmental discrimination have combined to continue to depress the opportunities for firms owned by socially and economically disadvantaged persons to compete on a discrimination-free basis for federally-supported highway construction contracts throughout the United States. The record also contains evidence of intentional discrimination on the basis of race, as well as evidence that discrimination in securing capital and other resources had affected minority and female business owners. See, *e.g.*, C. Grown & T. Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25-26, 39 (1992) (discussed by Rep. Norton, 144 Cong. Rec. at 10,656-10,657). Such discrimination raised costs for these firms, and in some instances simply made competing for contracts impossible. The use of "old boy networks," in some instances based on race or gender, often deprived newly formed minority businesses of the opportunity to bid on contracts and subcontracts. The evidence also shows that prime contractors would engage in bid shopping, and would allow their preferred subcontractors to match or better bids previously made by potential minority subcontractors. And there was evidence that black, Hispanic, Asian, and Native-American-owned businesses were underutilized in government contracts. See, *e.g.*, M. Enchautegui et al., *Do Minor-*

ity-Owned Businesses Get a Fair Share of Government Contracts? 11, 14-15, 19-22, 36, 61 (1997) (*Urban Inst. Rep.*) (discussed by Rep. Norton, 144 Cong. Rec. at 10,657-10,658).

Congress, moreover, relied on a wide-range of evidence, including statistical studies demonstrating varying levels of disparities in the utilization between minority- and non-minority-owned firms. See note 4, *supra*. As this Court stated in *Croson*, Congress has the authority to ensure that the federal government does not become a "passive participant" in private racial discrimination, and "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that all public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evils of private prejudice." 488 U.S. at 492. There was ample evidence within the legislative record for the court of appeals to conclude that, absent TEA-21 and its accompanying regulations, Congress would become exactly that passive participant, extending the effects of private racial and gender discrimination. See *Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 729-736 (2003) (holding that Congress's findings of gender discrimination were sufficient to support the Family and Medical Leave Act of 1993). And petitioner failed below, and fails here, to identify specific evidence in the record that is unreliable, or to explain how the legislative record is inadequate.[5]

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[5] Petitioners' reliance (03-960 Pet. 19; 03-968 Pet. 7) on a United States General Accounting Office Report to attack the use of disparity studies is unavailing. *GAO-01-586, Disadvantaged Business Enterprises* (June 2001) (*GAO Report*). This Court has repeatedly recognized that disparity studies can be relevant and probative of whether there is sufficiently strong evidence to demonstrate a compelling interest in remedial action. See *Croson*, 488 U.S. at

c. Equally important, the court of appeals' decision is consistent with every other federal appellate or district court decision analyzing the TEA-21 program. Every federal court that has considered whether TEA-21's legislative record is sufficient to uphold the statute's facial constitutionality has applied strict scrutiny and concluded that Congress had "a strong basis" in evidence to support its conclusion that remedial relief was necessary. See 03-960 Pet App. 7a (8th Cir.); *id.* at 24a (D. Neb.); 03-968 Pet. App. 26a-29a (D. Minn.); *Adarand II*, 228 F.3d at 1167-1176 (10th Cir.), aff'g 965 F. Supp. 1556, 1570-1577 (D. Colo. 1997)); *Western States Paving Co.* v. *Washington Dep't of Transp.*, No. C00-5204 RBL (W.D. Wash. Sept. 3, 2003), appeal pending, No. 03-35783 (9th Cir.); *Northern Contracting, Inc.* v. *State*, No. 00-C-4515, 2004 WL 422704 (N.D. Ill. Mar. 3, 2004). The consistent results reached by the federal courts of appeals and district courts that have reviewed the legislative record strongly suggest that this Court need not grant review in this case.[6]

503; *id.* at 509. Moreover, petitioners' reliance on the GAO Report to suggest that the court of appeals erroneously concluded that Congress had a compelling interest is misplaced, since the GAO Report expressly provides that its purpose "was not to address the question of whether the DBE program satisfies the requirements of strict scrutiny," *GAO Report* 82, and in fact reviewed only 14 such disparity studies.

[6] Cf. *Cortez* v. *NASA*, 950 F. Supp. 357 (D.D.C. 1996) (discussing whether Congress had a compelling interest supporting the Small Business Act and the SBA's race-conscious 8(a) contracting program); *id.* at 361 ("Congress first implemented the Small Business Act to combat serious unlawful discrimination in government contracting. In oversight and reauthorization hearings held since implementation of the act, Congress has continued to find such discrimination.").

Petitioner Gross Seed incorrectly asserts (03-960 Pet. 23-25) that the court of appeals decision conflicts with the Federal Circuit's decision in *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (2001). In *Rothe*, the Federal Circuit reversed a decision upholding the constitutionality of a federal defense contracting program that operated by increasing the bid of a non-minority-owned firm by up to ten percent. It held that the "district court improperly applied a deferential legal standard rather than 'strict scrutiny,' and impermissibly relied on post-reauthorization evidence to support the program's constitutionality as reauthorized." *Id.* at 1312. Because the court of appeals here applied strict scrutiny, did not defer to Congress, and considered only evidence that was in the legislative record when Congress enacted TEA-21, its decision does not conflict with *Rothe*.

2. This Court should not grant review of petitioners' claim (see, *e.g.*, 03-960 Pet. 20-22) that Congress lacked authority to enact TEA-21 because it did not have evidence of past discrimination in the construction industry in each of the 50 States. That claim is inconsistent with this Court's precedent and, if upheld, would seriously compromise Congress's authority to carry out its fundamental purpose to enact legislation to remedy problems that affect the Nation as a whole. Cf. *Hibbs*, 538 U.S. at 734-735.

To the extent petitioners assert that Congress may not enact even narrowly-tailored legislation—legislation that authorizes and requires a race-conscious remedy only in those local jurisdictions where there is discrimination (or its effects) that cannot otherwise be remedied—unless it first finds discrimination in every State, its contention is plainly without merit. Indeed, as this Court has explained, while a state or local

government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power to ensure that federal spending does not reinforce discrimination in locations where federal dollars are spent. *Croson*, 488 U.S. at 490-492 (plurality opinion); see *Oregon* v. *Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring); see also *Hibbs*, 538 U.S. at 734 (observing that Congress can look to evidence of inadequate leave policies nationwide in reaching conclusion about need for legislation, "no matter how generous" any one State's policies may have been).[7]

In any event, even though TEA-21 is national in scope, DOT's DBE regulations, if properly implemented, minimize the danger that state race-conscious DBE programs will be used where there is an absence of discriminatory effects that cannot be remedied through race- or gender-neutral means. As the court of appeals explained, "a valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." 03-960 Pet. App. 8a-9a. Since the DOT

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[7] Contrary to petitioner Gross Seed's claim (03-960 Pet. 24), the Federal Circuit's *Rothe* decision does not suggest that the court of appeals applied a "watered-down version of strict scrutiny" because it approved of TEA-21's DBE program without evidence as to its necessity in every State. In fact, *Rothe* says precisely the opposite. *Rothe*, 262 F.3d at 1329 (explaining that "[w]hereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, we do not think that Congress needs to have had evidence before it of discrimination in all fifty states in order to justify a race-conscious remedy"); see also *id.* at 1321 n.14 (noting that even under strict scrutiny Congress is entitled to deference in its factfinding).

regulations require that DBE participation goals be tied to local market conditions, they help to ensure that a State's implementation of the program depends on the circumstances in that jurisdiction, not in other parts of the country. In addition, the regulations allow waivers and exemptions in certain circumstances, contain exceptions from meeting overall DBE participation goals if there is a good-faith effort at compliance, and bar the use of race-conscious measures when full DBE participation in that State, again based on local assessments, can be achieved through race-neutral means. See pp. 7-8, *supra*. As a result, the statutory and regulatory provisions, taken together, are designed to assist States and other recipients of federal funds in determining when, *if at all*, targeted race-conscious remedial contracting measures are manifestly necessary to overcome the effects of discrimination in a particular jurisdiction. It is *only* in those circumstances, and in particular where it is clear that race-neutral measures are insufficient to overcome the effects of discrimination, that the federal DBE regulations permit fund recipients to adopt limited race-conscious remedies.

3. With respect to their claims regarding narrow tailoring, petitioners have presented no argument and cited no case law demonstrating that any portion of DOT's regulations is facially defective or incapable of constitutional implementation. Further, because petitioners did not establish below that there is no set of circumstances in which the regulations can be constitutionally applied, the question whether the regulations are narrowly tailored on their face is not presented. See *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984); *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

As the court of appeals noted (03-960 Pet. App. 9a-12a), DOT's DBE regulations satisfy this Court's requirement that the remedial use of race be narrowly tailored. The regulations limit the benefits of race-conscious remedies to those individuals who are considered socially and economically disadvantaged as defined in the regulations, and require recipients to set numerical DBE participation goals based on localized assessments of DBE availability and the DBE utilization expected in the absence of discrimination, thereby limiting the burden on non-minorities. The regulations also require that race-conscious contracting remedies be used only where there is demonstrable local evidence showing less than full DBE participation compared to what would be expected in the absence of discrimination, and even then only a determination that race-neutral efforts will be ineffective at achieving the overall DBE participation goal. Furthermore, the use of race-conscious contracting remedies in DBE programs authorized by TEA-21 and DOT regulations is of limited duration, because TEA-21 must be reauthorized (or further extended) to extend beyond April 30, 2004. See note 2, *supra*. Moreover, DOT's regulations require termination of the use of race- conscious measures in any jurisdiction where race-neutral measures are adequate to meet DBE participation levels expected in the absence of discrimination. Thus, on their face, DOT's regulations satisfy this Court's precedent describing the requirements of narrow tailoring. See, *e.g.*, *United States* v. *Paradise*, 480 U.S. 149 (1987); *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2342-2346 (2003); see also 64 Fed. Reg. 5096, 5102-5103 (1999).[8]

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[8] Petitioner Sherbrooke Turf also argues that the federal DBE program violates Section 5 of the Fourteenth Amendment and

4. Petitioners also argue (03-960 Pet. 22; 03-968 Pet. 20- 23) that the court of appeals erred in finding that Nebraska's and Minnesota's implementation of the federal DBE program are narrowly tailored. Petitioner Gross Seed, for example, asserts that the court "placed great weight on the fact" that Nebraska set its overall DBE participation goals in accordance with a study that "did not purport to[] prove discrimination against DBEs." 03-960 Pet. 22.

The question whether Nebraska or Minnesota has implemented the federal DBE program in a manner consistent with constitutional requirements is a fact-intensive inquiry that does not warrant this Court's review. Because each State, pursuant to DOT's regulations, adopts and implements its own individualized DBE program, tailored to conditions within its jurisdiction, a decision by this Court as to the constitutionality of Nebraska's or Minnesota's program will have little applicability to other jurisdictions.

In any event, the court of appeals correctly concluded that Nebraska's and Minnesota's DBE programs are sufficiently narrowly tailored. Though not dispositive on the constitutional questions, DOT found that those programs complied with federal DBE regulations that are designed to help narrowly tailor implementation of the federal DBE program by assisting States in determining when, if at all, race-conscious contracting preferences are manifestly necessary to remedy the effects of discrimination in a particular jurisdiction. For ex-

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impermissibly intrudes on matters reserved to the States. See 03-968 Pet. 6, 24-26. The federal DBE program, however, was enacted pursuant to Congress's authority under the Spending Clause, not the Fourteenth Amendment, and there is no justification for importing the fundamentally different standard for determining the constitutionality of Section 5 enactments to this case.

ample, both Nebraska and Minnesota analyzed local market conditions and set their annual DBE participation goals in 2000 and 2001 based on data that compared the availability and utilization of DBEs and took account of DBE participation that could be achieved through race-neutral means. 03-960 Pet. App. 14a; 03-968 Pet. App. 15a-16a. DOT reviewed the States' goal-setting methodology and determined that it complied with DOT's regulations.[9]

5. Petitioner Gross Seed argues (03-960 Pet. 14-17) that this Court should review the court of appeals' decision because it previously agreed to review the Tenth Circuit's decision in *Adarand II*, which, petitioner asserts, presented "the same important questions" raised in these cases. *Id.* at 5. Petitioner's reliance on this Court's prior grant of plenary review is misplaced. While both *Adarand II* and these cases involve elements of DOT's DBE regulations, there are important differences between the issues presented to this Court then and now.

The first Question Presented in *Adarand II*, for example, related to whether the court of appeals had

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[9] As it did in the court of appeals, petitioner Sherbrooke Turf relies on statements by various state employees that they personally were not aware of specific incidences of discrimination in highway construction in Minnesota to assert that there is no evidence of discrimination in Minnesota to support using race-conscious DBE goals. 03-968 Pet. 19. Petitioner, however, conceded at oral argument in the district court that the state employees merely stated that they did not know of any instances of discrimination and that "[t]hey did not say there isn't" any discrimination in Minnesota. Supp. Pet. App., Tab 1, Tr. 71. Thus, even according to petitioner, the state employees' statements, taken in the light most favorable to petitioner, do not cast doubt on the evidence relied upon by MNDOT to justify its race-conscious, remedial contracting goals.

"misapplied the strict scrutiny standard in determining if Congress had a compelling interest" to enact TEA-21. 00-730 Pet. at I. As explained above (at p. 18, *supra*), that question is not presented here. The *Adarand II* petition (00-730 Pet. at 6) alleged that the Tenth Circuit had improperly deferred to Congress and had "failed to demand a strong basis in evidence to support a compelling governmental interest." In contrast, the court of appeals here specifically stated that it took a "hard look" at the entire legislative record in determining whether Congress had a strong basis in evidence to demonstrate a compelling governmental interest. 03-960 Pet. App. 7a. In other words, the court of appeals here made clear that it gave the legislative record precisely the level of review that the petitioner in *Adarand II* alleged that the Tenth Circuit failed to provide.

The second Question Presented in *Adarand II* was "[w]hether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored." 532 U.S. 968 (2001). Although that question is also presented in these cases, the circumstances surrounding that issue have changed substantially since this Court's decision to grant review in *Adarand II*. The Tenth Circuit, when deciding *Adarand II*, was faced with the problem that the federal DBE regulations had been changed during the litigation itself. While the initial contract dispute occurred under old regulations, DOT promulgated its new regulations before the case returned for the second time to the Tenth Circuit. Indeed, the Tenth Circuit held that the federal DBE program under DOT's old regulations was unconstitutional, while the new regulations adequately addressed those constitutional infirmities. See 228 F.3d at 1176-1187.

The potential for uncertainty regarding DOT's regulations in the Tenth Circuit's decision has been substantially lessened by subsequent litigation. As stated above, each federal district court and court of appeals to examine the constitutionality of DOT's regulations has held that, on their face, the new regulations narrowly tailor the use of race and gender-based contracting remedies authorized by TEA-21. The more recent litigation, and the consistency of federal court decisions as to the DOT regulations, make plenary review of the second and final issue presented in *Adarand* three years ago unnecessary.

In sum, the fact that this Court granted plenary review in *Adarand II* does not compel a similar grant today. Cf. *Concrete Works of Colorado, Inc.* v. *City of Denver*, 124 S. Ct. 556 (2003) (Scalia, J., dissenting from the denial of cert.). Federal courts are carefully scrutinizing the legislative record, and are unanimously and consistently finding that Congress had a strong basis in evidence on which to conclude that a narrowly-tailored use of race-conscious contracting remedies is permissible. Moreover, as revealed by the consistent decisions of federal courts, DOT's regulations are, on their face, narrowly tailored and can be implemented by federal funding recipients in a constitutional manner. While the legal issues that govern the use of race-based contracting preferences were perhaps unclear when this Court granted review in *Adarand II*, both because the application of strict scrutiny to the federal government's use of race-conscious actions was relatively new, see *Adarand I*, *supra*, and because the ongoing modifications of the DOT regulatory scheme were confusing, federal courts, as of now, demonstrate neither confusion nor uncertainty when reviewing the facial constitutionality of TEA-21 and the DOT DBE regulations.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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In the Supreme Court of the United States

SHERBROOKE TURF, INC.,

Petitioner,

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, et al.,

and

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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MISCELLANEOUS:

Surface Transportation Extension Act of 2004,
Pub. L. No. 108-202, 118 Stat. 478 (2004) 9

Transportation Equity Act For The 21st Century,
("TEA-21"), Pub. L. No. 105-178,
112 Stat. 107 (1998) 1

BRIEF OF RESPONDENTS MINNESOTA DEPARTMENT OF TRANSPORTATION AND CAROL MOLNAU IN HER CAPACITY AS THE MINNESOTA COMMISSIONER OF TRANSPORTATION IN OPPOSITION

Respondents Minnesota Department of Transportation and Carol Molnau in her capacity as the Minnesota Commissioner of Transportation (collectively "MnDOT") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Eighth Circuit's opinion in this case. That Opinion is reported at 345 F.3d 964 (8th Cir. 2003), and is reproduced in the Petitioner's Appendix ("Pet'r App.") at 1.

STATEMENT OF THE CASE

In 1998, Congress passed the Transportation Equity Act For The 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107 (1998), which is the most recent federal transportation funding statute requiring recipients of federal funds to implement a Disadvantaged Business Enterprise ("DBE") program. The United States Department of Transportation ("USDOT") promulgated federal regulations for the implementation of a TEA-21 DBE program by recipients of federal funds in 49 C.F.R. pt. 26. To receive over $300 million in TEA-21 federal highway funds each year, MnDOT must implement the TEA-21 DBE program in accordance with the regulations, subject to USDOT oversight. *See* 49 C.F.R. pt. 26 (2003).

The Federal Government narrowly tailors the TEA-21 DBE program to its nationwide compelling interest, in part by requiring each recipient of TEA-21 funds to measure its contracting market using a two-step process to establish: (1) the baseline availability of DBEs and (2) adjustments for the effects of past discrimination in the recipient's contracting market. 49 C.F.R. § 26.45(c)-(d) (2003). Upon USDOT

approval, the recipient must use that result as its overall annual goal for DBE participation on TEA-21 funded projects. 49 C.F.R. § 26.45(f)(1).

Sherbrooke appears to misunderstand MnDOT's annual goal-setting methodology for Fiscal Year 2001 and the Eighth Circuit's findings relating thereto. Pet. at 3. To meet its 49 C.F.R. § 26.45 obligation for Fiscal Year 2001, MnDOT commissioned the National Economic Research Associates ("NERA") to study MnDOT's contracting market. Pet'r App. at 15-16. The NERA study did not measure merely the number of DBE firms present in MnDOT's market as Sherbrooke claims; rather the NERA study included both steps of the 49 C.F.R. § 26.45 measurement: baseline availability and adjustments for past discrimination. *Id.* Using the findings of the NERA study, MnDOT set its Fiscal Year 2001 annual goal at 11.6%. *Id.* Not only did MnDOT comply with the regulations in the past, there also is no evidence that MnDOT will disregard 49 C.F.R. § 26.45 in the future or that USDOT will fail to enforce its regulations by rejecting or modifying MnDOT's annual goals if necessary.

The regulations require recipients to use race-neutral[1] measures to assist DBEs and other small businesses. 49 C.F.R. § 26.51 (2003). Recipients must also estimate the amount of DBE participation that will be realized each year through race-neutral means. *Id.* MnDOT based its Fiscal Year 2001 race-neutral estimate on the level of DBE participation in the market during Fiscal Year 1999 when MnDOT was enjoined from administering the federal race-conscious program. Pet'r App. at 16. DBE participation during that year was 2.25%, from which MnDOT estimated that it could achieve 2.6% race-neutral participation during

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[1] This case involves challenges to the racial and gender classifications of the TEA-21 DBE program. Unless otherwise specified, references to race will include gender as well.

Fiscal Year 2001. *Id.* Each recipient must constantly monitor and adjust its race-neutral estimate. 49 C.F.R. § 26.51(f).

Each recipient must then compare its annual goal to its race-neutral estimate. 49 C.F.R. § 26.51. To the extent that the annual goal is not projected to be met by the race-neutral estimate, the recipient must use contract goals throughout the fiscal year on federally funded projects to try to achieve the annual goal for DBE participation. 49 C.F.R. § 26.51(d). For Fiscal Year 2001, MnDOT subtracted the 2.6% race-neutral estimate from the 11.6% annual goal to determine that it must attempt to achieve 9% DBE participation in its federally funded contracts through contract goals. Pet'r App. at 16. The USDOT approved MnDOT's goal-setting methodology, annual goal, and race-neutral estimate for 2001. *Id.*

When a recipient must use contract goals, the recipient sets goals for TEA-21 projects based on factors such as subcontracting possibilities on the project. 49 C.F.R. § 26.51(e). Pursuant to the regulations, prime contractors bidding for a TEA-21 project with a contract goal must either achieve the contract goal or demonstrate good faith efforts to achieve the contract goal. 49 C.F.R. § 26.53 (2003). The regulations prohibit quotas. Pet'r App. at 13. On this record MnDOT has found good faith efforts each time a bidder has failed to achieve its contract goal, which demonstrates that the contract goals are not quotas. Garza Aff. ¶¶ 30-33.[2]

The regulations provide the methodology and criteria that recipients must use when certifying firms as DBEs. 49 C.F.R. § 26.61 (2003). The regulations require firms seeking DBE certification to be owned and controlled by a socially and economically disadvantaged person and also define who is a socially and economically disadvantaged

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[2] Pursuant to Sup. Ct. R. 12(7), MnDOT refers to the Affidavit of Michael E. Garza, which was submitted to the Eighth Circuit in the Appendix of Defendants-Appellees Minnesota Department of Transportation.

person. 49 C.F.R. § 26.67 (2003). Contrary to Sherbrooke's assertions, MnDOT requires all applicants for DBE certification, regardless of the owner's race, to submit with their applications proof of ability to work and disadvantage. Pet. at 23; Garza Aff. ¶ 14. Under the regulations, the race of the owner applying for DBE certification can create a rebuttable presumption of disadvantage during the certification process, but the race of the owner is not determinative. 49 C.F.R. § 26.61.

Sherbrooke did not produce any evidence that MnDOT ever has used or ever will use any racial classifications other than those required by the regulations when implementing the TEA-21 DBE program. Any firm that is owned and controlled by a socially and economically disadvantaged person is eligible for DBE certification regardless of the race of the owner. 49 C.F.R. § 26.61. Any firm that is not owned and controlled by a socially and economically disadvantaged person is not eligible for certification as a DBE, regardless of race. *Id.* There is no evidence that MnDOT ever has certified or ever will certify as a DBE a firm whose owner is not socially and economically disadvantaged, regardless of race. Further, there is no evidence that MnDOT ever has denied or ever will deny DBE certification to a firm whose owner is a socially and economically disadvantaged white male.

Sherbrooke brought the present suit seeking prospective injunctive relief from the District of Minnesota in the form of an order enjoining MnDOT from further implementation of the TEA-21 DBE program.[3] The District of Minnesota granted the USDOT's and MnDOT's motions for summary judgment and denied Sherbrooke's cross-motion

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[3] This case does not involve a challenge to Minn. Stat. § 161.321 (2002), which creates race-conscious classifications for exclusively state funded highway projects.

for summary judgment and motion for reconsideration. Sherbrooke then appealed the District of Minnesota's orders to the Court of Appeals for the Eighth Circuit.

The Eighth Circuit affirmed the District of Minnesota.[4] Citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Eighth Circuit acknowledged that it must analyze the program under strict scrutiny. Pet'r App. at 7-8. After noting that the validity of the compelling interest identified for the classifications in TEA-21 was not challenged, the Eighth Circuit took "a hard look at the evidence" before Congress.[5] Pet'r App. at 8-9. After that review, the Eighth Circuit concluded that Congress did have a strong basis in evidence to support the racial classifications found in TEA-21. Pet'r App. at 9-10. The Court of Appeals for the Eighth Circuit noted that it reached the same conclusion as the Court of Appeals for the Tenth Circuit in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 at 1167-76 (10th Cir. 2000), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). *Id.* The Eighth Circuit then held that the compelling interest analysis should focus exclusively on the evidence before Congress. Pet'r App. at 10-11. Therefore, it did not require MnDOT to independently satisfy the compelling interest prong of strict scrutiny review. *Id.*

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[4] The Eighth Circuit consolidated Sherbrooke's appeal with a similar appeal from the District of Nebraska. *See Gross Seed Co. v. Nebraska Dep't of Roads, et al.*, No. 00-CV-3073, slip op. (D. Neb. May 6, 2002). Gross Seed Co. seeks certiorari from this Court in file No. 03-960.

[5] Sherbrooke asked the Eighth Circuit to conduct *de novo* review of the basis for the compelling interest. Pet'r App. at 9. Because the Eighth Circuit reached the same conclusion as the District of Minnesota--that there was a strong basis in evidence to support the racial classifications--remand for review under a different standard would be pointless. Pet'r App. at 10, 29.

The Eighth Circuit next analyzed the narrow tailoring of the TEA-21 DBE program. Pet'r App. at 12-15. Based on a full evaluation of the program, the Eighth Circuit found the TEA-21 DBE program was narrowly tailored on its face. Pet'r App. at 14-15. Finally, the Eighth Circuit found that the program remains narrowly tailored after MnDOT exercises its discretion in setting its annual goal. Sherbrooke now seeks review of the Eighth Circuit's ruling.

SUMMARY OF THE ARGUMENT

Certiorari should not be granted here because Sherbrooke fails to establish a conflict among the circuits or a conflict with relevant decisions of this Court. MnDOT addresses only questions three and four, the questions presented by Sherbrooke applicable to MnDOT's participation in the TEA-21 DBE program. Pet. at *i*. The Eighth Circuit properly stated the rule of law applicable here. Sherbrooke's allegations of misapplication of strict scrutiny by the Eighth Circuit do not establish a compelling reason to grant certiorari here.

ARGUMENT

I. THERE ARE NO CONFLICTS AMONG THE CIRCUITS WARRANTING THE COURT'S ATTENTION.

A. The Compelling Interest Analysis Of The Eighth Circuit Is Consistent With That Of The Other Circuits.

The decision of the Eighth Circuit does not conflict with other circuits that have addressed the issue of whether a state implementing a race-conscious federal program must independently satisfy strict scrutiny. The decision as it relates to application of the compelling interest prong of strict scrutiny is identical to the result reached by the other circuits.

See Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 57 (2d Cir. 1992) (State of New York need not satisfy either prong of strict scrutiny when implementing a federal program); *Ellis v. Skinner*, 961 F.2d 912, 916 (10th Cir.), *cert. denied*, 506 U.S. 939 (1992) (State of Utah need not satisfy either prong of strict scrutiny when implementing a federal program); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991) (State of Tennessee need not satisfy either prong of strict scrutiny when implementing a federal program); *Milwaukee County Pavers Assoc. v. Fiedler*, 922 F.2d 419, 423 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991) (State of Wisconsin need not satisfy either prong of strict scrutiny when implementing a federal program). In support of its position that both prongs of strict scrutiny must be applied to both the Federal Government enacting the program and a state implementing the program, Sherbrooke cites several cases where a government enacts and implements its own program. Pet. at 19. These cases have no bearing on the compelling interest analysis required when a state implements a program enacted by the Federal Government.

Sherbrooke also argues that the regulations require MnDOT to measure its marketplace and that the Eighth Circuit failed to reach this issue. Pet. at 19-20. However, after noting that analysis of MnDOT's compliance with the regulations properly belongs in the narrow tailoring analysis, the Eighth Circuit analyzed MnDOT's efforts for Fiscal Year 2001 to study its contracting market under 49 C.F.R. § 26.45. Pet'r App. at 15. At the conclusion of that analysis, the Eighth Circuit found that MnDOT's reliance on the NERA study to fulfill its 49 C.F.R. § 26.45 obligations was justifiable and that the program was constitutional as applied. Pet'r App. at 16. Because there is no evidence that MnDOT applies the TEA-21 DBE program to projects not funded by TEA-21, the Eighth Circuit reached the same conclusion as the other circuits. Therefore, there is no conflict among the

circuits as to application of the compelling interest prong of strict scrutiny to states implementing a federal race-conscious program.

B. The Narrow Tailoring Analysis Of The Eighth Circuit Is Consistent With That Of The Other Circuits.

Sherbrooke rests its criticism of the narrow tailoring analysis conducted by the Eighth Circuit entirely on the fact that the Eighth Circuit did not require MnDOT to independently establish a compelling interest to which the program is narrowly tailored. Pet. at 21-23. This argument is premised on an interpretation of law contrary to every circuit that has considered the issue, as discussed above, and on a misunderstanding of the regulations.

The record here is clear that MnDOT commissioned the NERA study to satisfy 49 C.F.R. § 26.45. Pet'r App. at 15-16. However, contrary to Sherbrooke's understanding of the regulations, MnDOT officials were not required to gather any other evidence of discrimination, including anecdotal evidence of individual acts of discrimination. Pet. at 19-20. MnDOT must only conduct a 49 C.F.R. § 26.45 study, submit the results of that study to USDOT, set its annual goal based on the results of that study as approved by USDOT, monitor its race-neutral participation throughout each year, and adjust its use of contract goals accordingly. *See* 49 C.F.R. §§ 26.45 and 26.51. Also, contrary to Sherbrooke's assertion, the fact that MnDOT personnel are not aware of specific acts of discrimination does not prove "that nobody has discriminated against anyone." Pet. at 18-19. The NERA study and the precipitous drop in DBE participation during Fiscal Year 1999 provide evidence of discrimination. Pet'r App. at 16.

While the other circuits have uniformly held that states implementing a federal program are not subject to

either prong of strict scrutiny, the Eighth Circuit found that the TEA-21 DBE program provides for "substantial discretion" by the recipients in setting annual goals. Pet'r App. at 15. MnDOT intends to exercise any discretion it has in full compliance with every aspect of the regulations and must fully comply in good faith in order to receive TEA-21 funds in the future.[6] Garza Aff. ¶ 6. Therefore, the only question left for the Eighth Circuit to consider was whether the TEA-21 DBE program remains narrowly tailored after MnDOT exercises its discretion in setting its annual goals. Pet'r App. at 15.

The Eighth Circuit analyzed MnDOT's goal-setting methodology for Fiscal Year 2001 and found that MnDOT satisfied the regulations and further found that Sherbrooke failed to establish that MnDOT acted inappropriately in using NERA or relying on the NERA study. Pet'r App. at 16. MnDOT's reliance on the results of the NERA study were further buttressed by MnDOT's evidence of the precipitous drop in DBE participation during Fiscal Year 1999, when MnDOT was enjoined from implementing the previous federal DBE program. Pet'r App. at 16.

The Eighth Circuit fully considered all evidence concerning MnDOT's compliance with the regulations and correctly ruled that the evidence submitted by Sherbrooke was insufficient to show that the TEA-21 DBE program was not narrowly tailored as applied. Pet'r App. at 16. Sherbrooke's evidence regarding MnDOT's annual goal-setting "failed to establish that better data was available or that MnDOT was otherwise unreasonable in undertaking this thorough analysis and in relying on its results." *Id.*

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[6] Evidence of future conduct is relevant because Sherbrooke seeks only prospective injunctive relief here. Sherbrooke fails to explain why review is warranted when the current extension of TEA-21 will expire on April 30, 2004. *See* Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, 118 Stat. 478 (2004).

The Eighth Circuit did not create a conflict with other circuits when it evaluated MnDOT's annual goal-setting methodology. Instead, after acknowledging the rulings of the other circuits, the Eighth Circuit distinguished the TEA-21 DBE program from those considered by the other circuits based on the TEA-21 DBE program's delegation of substantial discretion to the recipient in the duty to measure the recipient's market. Pet'r App. at 11. Therefore, there is no conflict among the circuits as to the application of the narrow tailoring prong of strict scrutiny to a state that implements a federal race-conscious program as a condition of receipt of federal funds. Review of the Eighth Circuit's decision is not warranted here.

II. Certiorari Is Not Warranted Because There Is No Conflict With Relevant Decisions Of This Court.

A. The Eighth Circuit's Decision Is Consistent With The Compelling Interest Analysis In Relevant Decisions Of This Court.

Sherbrooke argues that the decision of the Eighth Circuit regarding its as applied challenge against MnDOT conflicts with this Court's rulings in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Pet. at 18-20. In *Croson*, this Court did not have occasion to consider the evidentiary obligations under strict scrutiny of a state that implements a race-conscious program enacted by Congress. *Croson*, 488 U.S. at 477-78 (city enacted and implemented its own program). However, in its compelling interest analysis in *Croson*, this Court mentioned only the evidence from within the city presented to the Richmond City Council prior to its enactment of the program, except to note that the city could not rely on either the nationwide findings of Congress or the testimony of the city's public works director regarding

discrimination in his hometown, Pittsburgh, Pennsylvania. *Id.* at 499-500. Thus, *Croson* requires examination of only the basis in evidence before the enacting legislative body to support its classification. The Eighth Circuit complied with the compelling interest prong of strict scrutiny as described by this Court in *Croson* when it applied strict scrutiny to the evidence before Congress. Pet'r App. at 9.

In *Adarand*, this Court held that enactments of the Federal Government are subject to strict scrutiny just as the local program was in *Croson*. *Adarand*, 515 U.S. at 205-09 (federal agency implemented program enacted by Congress). Therefore, the Eighth Circuit complied with *Adarand* by complying with *Croson*. With regard to the compelling interest analysis, the Eighth Circuit's ruling is consistent with *Adarand* and *Croson* and does not create a conflict.

B. The Eighth Circuit's Decision Is Consistent With The Narrow Tailoring Analysis In Relevant Decisions Of This Court.

The Eighth Circuit cited the applicable decisions of this Court regarding narrow tailoring analysis and properly applied the facts of this case to that law. Pet'r App. at 11-16. As discussed above, part of that narrow tailoring is accomplished by the requirement that each recipient of TEA-21 funds evaluate its own contracting market and set its annual goal accordingly. A recipient's obligation to be aware of discrimination in its market is limited to conducting the 49 C.F.R. § 26.45 study to set its annual goal and to reduce its use of contract goals throughout each year if it finds race-neutral participation to an extent greater than its original race-neutral estimate. 49 C.F.R. § 26.51(f). The Eighth Circuit's holding, that the TEA-21 DBE program is constitutional as applied by MnDOT, necessarily includes a finding that MnDOT complies with these regulations. Pet'r App. at 16.

Applying strict scrutiny, the Eighth Circuit examined the program after MnDOT set its Fiscal Year 2001 annual goal. Pet'r App. at 11. The Eighth Circuit noted that the decisions of the other circuits considering the strict scrutiny obligations of a state implementing a federal program were decided prior to *Adarand* and contained different regulatory schemes. Pet'r App. at 10. Accordingly, the Eighth Circuit considered the impact of MnDOT's exercise of "substantial discretion" in its narrow tailoring analysis. Pet'r App. at 15. This deeper examination is consistent with *Croson* and *Adarand*. The Eighth Circuit considered this Court's principal narrow tailoring decision, *U.S. v. Paradise*, 480 U.S. 149 (1987), and this Court's most recent relevant decision, *Grutter v. Bollinger*, 539 U.S. 306 (2003). Pet'r App. at 11-12. The Eighth Circuit stated the proper rule of law and applied that law to the record in this case. Sherbrooke's request for this Court to reexamine that record and reapply the facts to the law should be denied.

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: April 7, 2004

Respectfully submitted,

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